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IN THE

Supreme Court of the United States

OCTOBER TERM, 1904.

HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Complainants, Appellants,*

v.

TERENCE O'BRIEN as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, *Defendants, Appellees.*

No. 193

BRIEF OF APPELLANTS

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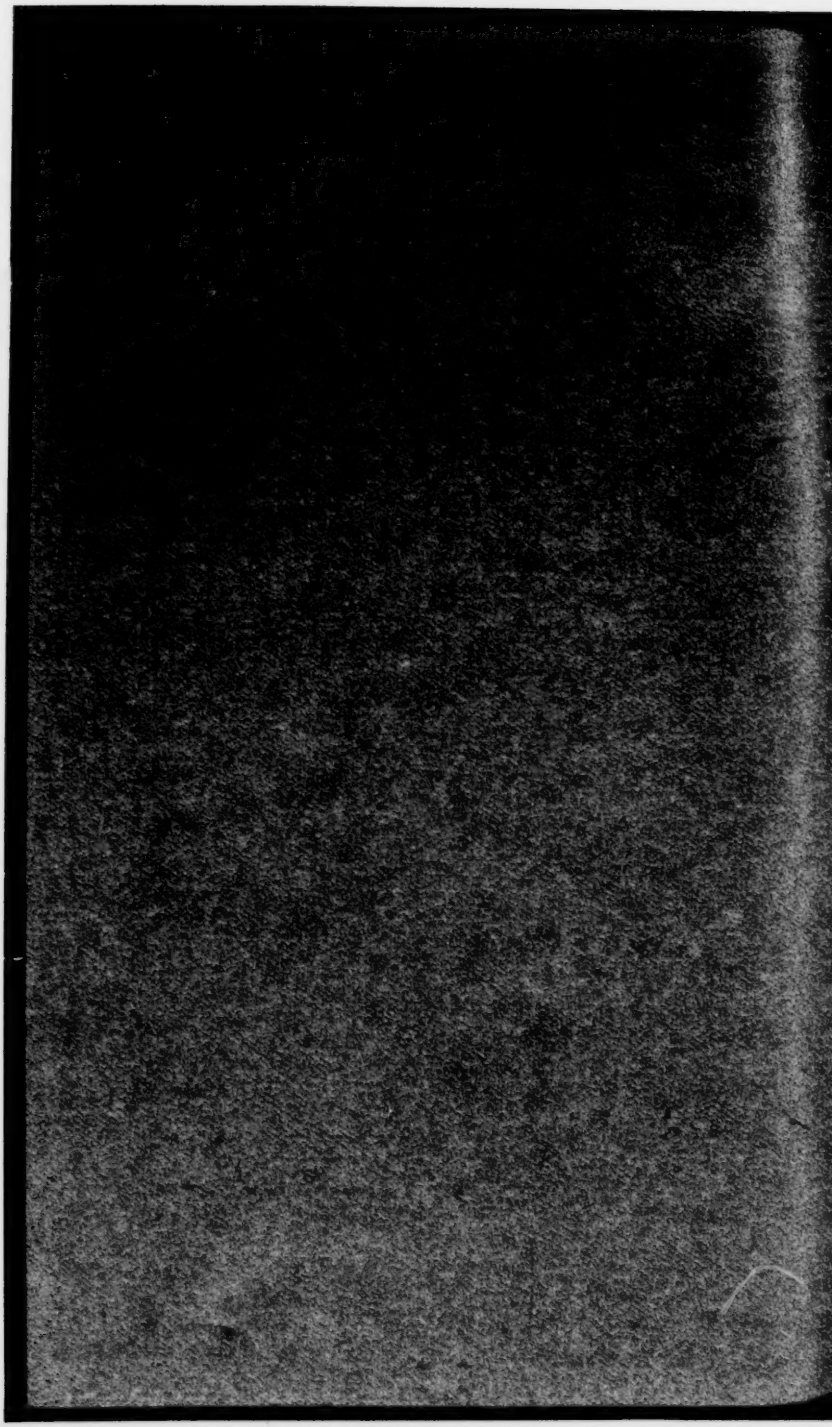

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APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT.

BRIEF OF COUNSEL FOR APPELLANTS

STATEMENT.

This suit is pending here on appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, which reversed the decree of the Circuit Court of the United States for the District of Washington, and directed that Court to dismiss complainants' bill for want of jurisdiction. It is also pending here upon the applica-

tion of the complainants for a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Ninth Circuit, to review that decree in case this Court should hold that the decree of the United States Circuit Court of Appeals was final. A motion to dismiss the appeal was submitted to this Court in October last, and briefs were filed in support of and in opposition to the motion. Briefs were also filed in support of and in opposition to the application for the writ of *certiorari*. The Court took both motions under consideration and entered an order reserving its decision until after the case should be heard upon its merits.

The Circuit Court of Appeals, in reversing the decree of the Circuit Court, which had been rendered in favor of the complainants, and in directing the dismissal of the bill for want of jurisdiction of the Circuit Court over the subject matter of the suit, held: (826-846.)

1. That two British subjects, heirs at law and next of kin of an intestate who at the time of his death resided and who died in King County, Washington, leaving real and personal property there worth upwards of three hundred thousand dollars, could not maintain a suit in the Circuit Court of the United States for the District of Washington against the administrator of the estate of the deceased, a citizen of the United States residing in the State of Washington, for an accounting, and another citizen of the United States residing in the State of Washington, claiming the entire estate under an alleged nuncupative will of the deceased, probated by a decree of the Superior Court of the State of Washington for King County, regu-

lar upon its face, void in fact, obtained by fraud and rendered without jurisdiction, to enjoin the claimant under the pretended will and the pretended decree of probate from obtaining possession of the entire estate under an order of the Superior Court which she applied for and which the Superior Court, unless she were restrained from prosecuting her application, would grant, requiring the administrator to surrender to her the property of the complainants held by him in trust for complainants, and which action the bill specifically alleged would:

"DEPRIVE YOUR ORATORS AND EACH OF THEM OF THEIR SAID PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE RIGHTS OF YOUR ORATORS AND EACH OF THEM UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES." (4-11.)

2. That the Circuit Court of the United States for the District of Washington had no jurisdiction of the subject matter of such a suit by such heirs and next of kin, against the administrator and such claimant, to construe the alleged nuncupative will and determine it invalid on its face, although the bill alleged that under the law of the State of Washington a nuncupative will was invalid where the estate bequeathed exceeded the sum of two hundred dollars.

3. That the Circuit Court of the United States for the District of Washington had no jurisdiction of such suit between such parties, to construe the alleged nuncupative will and decree that real estate was not conveyed by it.

4. That even if the Circuit Court of the United States for the District of Washington had jurisdiction of any one of the foregoing controversies, the fact that the claimant under the alleged nuncupative will pleaded that persons other than complainants in this suit also claimed to be the only heirs and next of kin of the deceased, which persons could not be made parties by reason of their citizenship, deprived the Circuit Court of the United States for the District of Washington of jurisdiction to determine the controversies between the parties before the Court, although no decree could be entered affecting in any manner the rights of such absent claimants, and though all parties before the Court possessed the requisite diversity of citizenship and contended that the claims of the absent parties were without foundation in fact.

The decree of the Circuit Court adjudged: (131-133.)

1. That complainants are first cousins, heirs at law and next of kin of John Sullivan, deceased, late of the City of Seattle, State of Washington, and as such, entitled to share in his estate.

2. That the pretended nuncupative will claimed by the defendant, Marie Carrau, to have been made by said John Sullivan on the 25th of September, 1900, at about 11 o'clock P. M., in the following words, to-wit:

"I want you to remember and witness that I will all my property and personal effects, worth many thousands of dollars, to be the money and property of your sister, Marie Carrau. I am sick and we know not what might happen."

was never made by said John Sullivan, nor did the said John Sullivan speak said words or any of them, or any words of such import, nor did he make any will whatever.

3. "That the Superior Court of the State of Washington for King County, never acquired jurisdiction to probate said alleged nuncupative will. Said Court never made any lawful order for the issuance of a citation, nor was any lawful citation ever issued, nor was any notice of any proceeding to probate said alleged will ever given to or had by anyone, nor did said Court ever acquire jurisdiction to hear any evidence for the probate of said alleged will, but said Court acted wholly without jurisdiction in the matter of the probate of said alleged will, and the certificate of probate of said alleged will granted by said Court on the 8th day of March, 1901, and the decree of said Court purporting to have been rendered and entered on said 8th day of March, 1901, admitting said alleged will to probate as the last will and testament of said John Sullivan, deceased, were made and rendered wholly without jurisdiction, and said proceedings and all proceedings in the matter in said Superior Court numbered 3664, entitled, 'In the Matter of the Estate of John Sullivan, Deceased,' in so far as they relate to the alleged probate of said alleged nuncupative will, are null and void and of no force and effect."

4. That Terence O'Brien, as administrator of the estate of John Sullivan, deceased, is directed to recognize the right of each of complainants to share in said estate as a first cousin of said deceased and as one of the next of kin of said deceased John Sullivan.

5. "That the defendant Marie Carran, and all persons claiming under her or representing her in any manner whatever, are hereby perpetually restrained and enjoined from setting up or asserting in any manner whatsoever, any claim, right or title to or interest in the estate of said John Sullivan, deceased, or any part thereof, under said alleged nuncupative will and under the alleged pro-

bate thereof, or under either thereof, and from setting up, asserting or in any manner whatsoever making any claim whatsoever under said alleged nuncupative will, and under the alleged probate thereof, or either thereof, in any court or elsewhere, except in a court having appellate jurisdiction to review this decree."

The defendant, Marie Carrau, had in her answer denied that "*the vesting of said estate or the distribution of said property by said Superior Court to this defendant would be in violation of the rights of said complainants or either of them under the Fourteenth Amendment to the Constitution of the United States.*" (40.) She alone appealed from the decree of the Circuit Court to the United States Circuit Court of Appeals for the Ninth Circuit. In her assignments of error, the only error properly assigned by her was that the Circuit Court erred in not sustaining her motion to dismiss the bill for lack of jurisdiction which motion alleged:

"That the matters and things pleaded in said bill were exclusively subject to the jurisdiction of the probate court of the State, and not cognizable in the Federal Court." (16, 138.)

The other attempted assignments of error were too general to require their consideration by the Court of Appeals.

As stated, the Circuit Court of Appeals entered a decree reversing the decree of the Circuit Court for want of jurisdiction over the subject matter of the suit, and directing that Court to dismiss the bill.

The complainants prayed for and obtained the allow-

ance of an appeal from the decree of the Circuit Court of Appeals, on the ground that the decree of the Circuit Court of Appeals was not final, and that the amount involved was sufficient to authorize an appeal to this Court.

SPECIFICATIONS OF ERROR.

The decree of the Circuit Court of Appeals is erroneous in the particulars hereinafter set forth, and appellants rely for a reversal of that decree, upon the following specifications of error, to-wit: (849.)

1. The decree is erroneous in reversing the decree of the Circuit Court of the United States for the District of Washington, and directing said Circuit Court to dismiss the bill for want of jurisdiction, with costs.

2. The decree is erroneous in adjudging that the Circuit Court of the United States for the District of Washington had no jurisdiction of the subject matter of the suit.

3. The decree is erroneous in adjudging that persons not before the Circuit Court were necessary parties, and if made parties their joinder would oust the Circuit Court of jurisdiction, and therefore, said Circuit Court could not acquire jurisdiction of said suit.

4. The decree is erroneous in adjudging that the subject matter of the suit was within the exclusive jurisdiction

of the Superior Court of the State of Washington for King County.

5. The decree is erroneous in adjudging that the Circuit Court of the United States for the District of Washington, had no jurisdiction in equity of the subject matter of the suit.

6. The decree is erroneous in adjudging that the Circuit Court of the United States for the District of Washington had no jurisdiction in equity of the suit for the annulment of a fraudulent nuncupative will and its probate, which was procured by fraud, although the amount involved was sufficient and the requisite diversity of citizenship existed to give said Circuit Court jurisdiction, and although an equitable proceeding could have been maintained by the same complainants against the same defendants in the courts of the State of Washington exercising general jurisdiction.

7. The organic act of Washington Territory, enacted by Congress and approved March 2nd, 1853, by section 6, provided that every law of the Territory "shall embrace but one object, and that shall be expressed in the title" The Territory, by the act of 1854, entitled "An act respecting wills," enacted that no nuncupative will shall be valid where the estate bequeathed exceeds two hundred dollars ($200.00), nor unless it be executed in a certain manner. The legislature of the Territory, in an act approved November 11, 1873, entitled, "An act defining the jurisdiction and practice in probate courts of Washington Territory," omitted the limitation on the amount of an estate which might be bequeathed by nuncupative will. The decree of

the United States Circuit Court of Appeals in this suit is erroneous in holding that the Circuit Court did not have jurisdiction to entertain a suit in equity to determine that the alleged nuncupative will was invalid because the said act of 1873 and all subsequent acts of said Territory having the same title, in so far as they attempted to repeal the provision of said act of 1854 imposing said limit, were void, because their titles were in conflict with said section 6 of said organic act.

8. The decree is erroneous in adjudging that the Circuit Court of the United States for the District of Washing had no jurisdiction in equity where the requisite diversity of citizenship existed and the amount involved was sufficient, to entertain a suit to construe the alleged will and determine that real estate did not pass under it.

9. The decree is erroneous in adjudging that the Circuit Court of the United States for the District of Washington had no jurisdiction in equity to enjoin the defendant administrator from distributing and his insolvent co-defendant from receiving, under an alleged nuncupative will, probated without jurisdiction, the entire estate of the deceased claimed by complainants as heirs at law and next of kin of the deceased, which distribution, if made, would create a cloud upon the title of complainants and deprive them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

10. The decree is erroneous in adjudging that the Circuit Court of the United States for the District of

Washington had no jurisdiction of a suit in equity to annul a pretended will and its fraudulent probate in a case where the requisite diversity of citizenship existed and the amount involved was sufficient for jurisdictional purposes, although by the law obtaining in the State of Washington, customary and statutory, an equitable proceeding *inter partes* might be maintained for the same purpose in the courts of the State exercising general jurisdiction.

11. The decree is erroneous in adjudging that it was within the power of the State of Washington to create an equitable right, enforceable by an equitable remedy *inter partes* in the courts of the State exercising general jurisdiction, but which could only be enforced in the courts of the State, although the requisite diversity of citizenship and the amount involved were sufficient to give the Circuit Court of the United States for the District of Washington jurisdiction.

12. The decree is erroneous in adjudging that the State of Washington has provided a right and remedy enforceable in the State courts only.

13. The decree is erroneous in adjudging that the Circuit Court of the United States for the District of Washington had no jurisdiction of a suit by complainants, subjects of the King of Great Britain and Ireland, against citizens of the State of Washington, to enjoin the creation of a cloud upon the title of complainants' real estate and to prevent complainants' property from being disposed of to an insolvent under an alleged nuncupative will, probated by a decree founded upon false testimony and fraudulent evidence, by a court which never acquired jurisdiction.

14. The decree is erroneous in adjudging that the Circuit Court of the United States for the District of Washington had no jurisdiction of a suit in equity to prevent complainants being deprived of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by defendants, under a false and fraudulent nuncupative will, probated by a decree rendered *ex parte*, procured by fraud, based solely on false evidence, and without jurisdiction in the court rendering such decree, but which decree showed jurisdiction upon its face.

15. The decree is erroneous in reversing the decree of the Circuit Court of the United States for the District of Washington, and directing said Court to dismiss the bill for want of jurisdiction, it being alleged in said bill that the alleged nuncupative will had been probated without jurisdiction; that the Court entering the decree of probate had not acquired jurisdiction to hear any evidence or take any steps for the probate of a nuncupative will wherein the estate bequeathed exceeded the value of two hundred dollars ($200.00); that no legal citation had been issued out of the Court; that the Court had acquired no jurisdiction to hear any proof; that under the laws of the State of Washington a nuncupative will is invalid where the estate bequeathed exceeds the value of two hundred dollars ($200.00); that the Court probating said will had no jurisdiction over the real estate of the deceased claimed by complainants as his sole heirs at law; that the Superior Court, without having acquired jurisdiction, was about to order the administrator to surrender the estate to the defendant claiming under the alleged will, and that the administrator would obey said order, and the action of the

administrator in obedience to said order would deprive complainants and each of them of their said property without due process of law, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States; which allegations were denied in the answer of the defendant, Marie Carrau; and the jurisdiction of the Circuit Court of the United States having been invoked on the ground that complainants were about to be deprived of their property without due process of law, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States, the said United States Circuit Court of Appeals had no jurisdiction of an appeal from the decree of said Circuit Court, and said United States Circuit Court of Appeals should have dismissed said appeal for want of jurisdiction to hear the same.

ARGUMENT.

Motion to Dismiss.

I.

The appellee, Marie Carrau, alone has moved to dismiss the appeal in this case. The grounds of the motion are thus stated by her counsel at page 10 of their brief:

"First: Because the decision of the Circuit Court of Appeals is final, under section 6 of the Judiciary Act of March 3, 1891; and

"Second: Because it is clear from the record that

neither the Circuit Court, the Circuit Court of Appeals, nor this Court has any jurisdiction of the case."

We agree with her counsel that the Circuit Court of Appeals had no jurisdiction of the case. We deny that this Court is without jurisdiction, and we deny that the Circuit Court was without jurisdiction.

The first question to be considered, then, is whether this Court is without jurisdiction for the reason that the decree of the Circuit Court of Appeals was final. If the decree of the Circuit Court of Appeals was not final, this Court has jurisdiction, because an appeal then exists as a matter of right.

"But to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was *dependent 'entirely'* upon *diverse citizenship.*"

Northern Pacific v. Soderberg, 188 U. S. 526.

Ayres v. Polsdorfer, 187 U. S. 585.

Howard v. U. S. to the use of Stewart, 184 U. S. 676.

Hugulay Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290.

Loeb v. Columbia Township, 179 U. S. 472.

Robinson v. Caldwell, 165 U. S. 359.

Colo. Cent. Co. v. Turck, 150 U. S. 138.

The bill invoked the jurisdiction of the Circuit Court upon two grounds:

First: Because complainants were aliens, subjects of the King of Great Britain and Ireland, and defendants

were citizens of the United States and of the State of Washington, and the amount involved was sufficient.

Second: Because the case involved the construction and application of the Fourteenth Amendment to the Constitution of the United States, to prevent complainants from being deprived of their property without due process of law, under authority of the State of Washington, by a judgment of the state court and proceedings thereon, all rendered and taken without jurisdiction and without notice to complainants.

The opinion of the Circuit Court, which it is permissible to refer to,

(*Loch v. Trustees*, 179 U. S. 472)

shows that the Circuit Court treated both grounds of jurisdiction as well founded (131-133).

In the opinion of the Circuit Court of Appeals, that Court said:

"We are of the opinion that the court below was without jurisdiction of the subject matter of the suit, and further that all necessary parties were not before the court, some of whom, if made parties, would have ousted the court of jurisdiction. On both of these grounds we think that the court below should have dismissed the bill at the complainants' cost (834). * * * Without reference to the merits of the suit, concerning which we cannot properly indicate any views, it results that the judgment must be and hereby is, reversed, and the cause remanded to the court below with directions to dismiss the bill at complainants' cost." (845.)

The first question then, which is presented to this court, is whether the decree of the Circuit Court of Appeals was final because the jurisdiction of the Circuit Court was *dependent entirely on diverse citizenship*, and that therefore this court is without jurisdiction.

As before stated, the Circuit Court of Appeals held that jurisdiction in the Circuit Court could not exist by reason of diverse citizenship. Does the word "dependent" in that clause of the Act of March 3, 1891, making the decree of the Circuit Court of Appeals final in all cases where the jurisdiction is dependent entirely on diversity of citizenship, mean that jurisdiction in the Circuit Court must exist entirely by reason of diverse citizenship, or does it mean that the jurisdiction of the Circuit Court must be *invoked entirely* upon the ground of diverse citizenship? If the meaning of the statute is that jurisdiction must *exist* in the Circuit Court entirely by reason of diverse citizenship, then the decree of the Circuit Court of Appeals could not be final in a case where the decree of the Circuit Court of Appeals holds that such jurisdiction did not exist.

If, upon the other hand, the word "dependent" means "invoked," then it is equally clear that the decree of the Circuit Court of Appeals in this case was not final, because the bill shows that the jurisdiction of the Circuit Court was invoked, not only on the ground of diverse citizenship, but also upon the ground, specifically alleged in the bill, that the complainants were under State authority about to be deprived of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

The interpretation which has been placed by this court upon the word "dependent" in the act, has not been uniform. It has in some cases been interpreted as meaning that the jurisdiction of the Circuit Court must have *attached;* in others, that it must have been *invoked.* It is apparent that entirely different results might follow by giving these different meanings to the same word. If the word "dependent" means "attached," in the sense that jurisdiction in the Circuit Court must *exist entirely* by reason of diversity of citizenship, as distinguished from the jurisdiction being *invoked* upon that ground but not existing, then there is no difficulty in harmonizing the various provisions of the act. If, however, the word "dependent" is to be interpreted as synonymous with "invoked," then the decree of the Circuit Court of Appeals cannot be held final, where the bill invokes the jurisdiction of the Circuit Court both upon diversity of citizenship and also upon other grounds, although if such other grounds only were pleaded they might not be sufficient to cause the jurisdiction of the Circuit Court to attach.

It cannot, we submit, be the law, that in determining the question of the finality of a decree of the Circuit Court of Appeals, the word "dependent" means "invoked" upon the ground of diversity of citizenship only, and therefore, whether rightfully or wrongfully invoked on that ground, the decree of the Court of Appeals is final, while the same word, in determining whether the jurisdiction of the Circuit Court is dependent on that ground, and also some other ground, means that such other ground of jurisdiction of the Circuit Court must in fact exist in order to prevent the decree of the Circuit Court of Appeals from being final.

In the case of

Florida Central & Peninsular R. R. Co. v. Bell, 176 U. S., 321,

the plaintiffs brought a joint action in ejectment against the railroad company, a Florida corporation. The citizenship of certain of the plaintiffs was disclosed by the complaint. The citizenship of the other plaintiffs was not shown. The Circuit Court took jurisdiction of the case on the theory that it was one arising under the laws of the United States. Judgment was rendered in favor of the plaintiffs. A writ of error was taken to the Circuit Court of Appeals, and the judgment of the Circuit Court was affirmed. A writ of error was then prosecuted to this court to review the judgment of the Circuit Court of Appeals.

Mr. Justice Shiras, in delivering the opinion of this court said:

"Our first inquiry is whether this court has jurisdiction to review the judgment of the Circuit Court of Appeals. The writ of error in this case was brought under section 6 of the Judiciary Act of March 3, 1891. If the judgment of the Circuit Court of Appeals was final under that section, this writ of error must be dismissed. In order to maintain our jurisdiction it must appear that the jurisdiction of the Circuit Court was not dependent solely upon the opposite parties being citizens of different states. Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. Rep. 35; Press Pub. Co. v. Monroe, 164 U. S. 105.

"This question must be answered upon an inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that plaintiffs *invoked* the jurisdiction of that court because the parties were citizens of different

states, or because the case was alleged to be one arising under the constitution, laws or treaties of the United States? The action was in ejectment, to recover possession of a tract of land in Hillsboro County, State of Florida. The plaintiffs were eight in number, three of whom were alleged to be citizens of the State of Texas, and there was no allegation as to the citizenship of the other five. The defendant, the Florida Central and Peninsular R. R. Co., was alleged to be a corporation organized and existing under the laws of Florida, hence upon the face of the declaration the jurisdiction of the Circuit Court would have failed, at least as to five of the plaintiffs, if that jurisdiction depended solely on the citizenship of the parties. The declaration, however, alleges that the plaintiffs claim title to the land in dispute by virtue of a patent granted to their ancestor by the Government of the United States; that the defendant claimed title under the first section of an Act of Congress entitled 'An Act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of certain railroads in said states' approved May 17, 1856; and further, that the defendant railroad company claimed and insisted that it was entitled to locate and maintain the route of its road through the land in question under said Act of Congress.

"Accordingly, it appears that the *theory* of the plaintiffs in bringing their suit in the Circuit Court of the United States was that the controversy was between a patentee of the United States and a railroad company claiming a right to occupy the land embraced in the patent by virtue of an Act of Congress, and was therefore, a case arising under the laws of the United States. This was the view of the judge who tried the case in the Circuit Court, as he refused to grant defendants' motion to dismiss for want of jurisdiction, and this view was also taken by the Circuit Court of Appeals, as appears in the following passage of its opinion:

" 'There is no effort in this case to found the jurisdiction of the Circuit Court on the diverse citizenship of the parties. There is nothing in the record to indicate that the judge of the Circuit Court entertained jurisdiction of the case on that ground. * * *'

"As, then, the plaintiffs in the Circuit Court *claimed* in their declaration that the controversy was one that turned on a construction of the laws of the United States, and as both the courts below dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the Circuit Court of Appeals was final, because the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties being citizens of different states. * * *

"We come to the case, then, as one in which we have a right to supervise the judgment of the Circuit Court of Appeals, and the first question, and indeed, as we read the record, the only one we have to meet, is whether the Circuit Court had jurisdiction of the case? Not having, as we have seen, jurisdiction, because of a controversy between citizens of different states, did it have jurisdiction because the case was one arising under the Constitution and laws of the United States? This question was answered affirmatively in both courts below, and this because, as it seemed to them, the plaintiff's declaration disclosed such a case. * * *

"(p. 332). Apart from the question of jurisdiction arising from the presence of any Federal question, can it be said that jurisdiction did *attach* in respect to those plaintiffs who were alleged to be citizens of Texas? * * *

"(p. 335). As, then, in the present case, the plaintiffs elected to assert a joint claim and title to the land in dispute, and recovered a joint judgment for their undivided interest therein, and as the plaintiff's declaration discloses no Federal question, the principles of the cited cases apply, and compel a dismissal of the suit for want of jurisdiction in the Circuit Court. * * *

"The judgment of the Circuit Court of Appeals is reversed. The judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court with directions to dismiss the action for want of jurisdiction."

This case, therefore, clearly shows that the construction to be given to the clause of the act making the decrees of the Circuit Courts of Appeals final, is to be determined, not by ascertaining whether jurisdiction in the Circuit Court exists, but whether it is claimed in good faith and not fictitiously in the pleading which invokes the jurisdiction of the Circuit Court. It is also plain, from this decision, that in determining the finality of the decree of the Circuit Court of Appeals, the question is not, upon what ground can the decree of the Circuit Court be sustained, because in the case just cited, it could not be sustained at all; but the question is, upon what ground was the jurisdiction *invoked* by the party seeking it?

If the decree of the Circuit Court of Appeals is to be held final in cases where the jurisdiction of the Circuit Court cannot attach by reason of any Federal question, although invoked on that ground, then the decision just cited would not have been rendered. Neither in the case at bar, can the decree of the Circuit Court of Appeals be held final because the jurisdiction of the Circuit Court is dependent entirely on diverse citizenship, for the jurisdiction of the Circuit Court was invoked on other grounds than diverse citizenship, and the Circuit Court of Appeals denied the jurisdiction of the Circuit Court on the ground of diverse citizenship.

"When the question is whether a judgment of the Circuit Court of Appeals is final in a particular case, it may well be that the jurisdiction of the Circuit Court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff *invoked* the authority of that court *only upon that ground*.

Loeb v. Trustees, 179 U. S. 472, 479.

"Section 6 provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review the final decisions of the District and Circuit Courts 'in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals, shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states.' The jurisdiction referred to is the jurisdiction of the Circuit Court, and as the judgment of the Court of Appeals is made final in all cases in which the jurisdiction of the Circuit Court *attaches solely by reason of diverse citizenship*, it follows that the Court of Appeals has power to review the judgment of the Circuit Court in *every such case*, notwithstanding constitutional questions may have arisen *after the jurisdiction of the Circuit Court attached*, by reason whereof the case became embraced by section 5."

American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 280.

From these cases it would seem necessarily to follow that the decree of the Circuit Court of Appeals holding that the jurisdiction of the Circuit Court had not attached, was not final. If, in order to render the decree of the Circuit Court of Appeals final, the word "dependent" is to be interpreted as "attached," the decree in the case at bar was not final, because the court held that the jurisdiction never attached. If the word "dependent" is to be interpreted as synonymous with "invoked," the decree of the Circuit Court of Appeals was not final, because the jurisdiction of the Circuit Court was invoked not entirely upon the ground of citizenship, but upon that ground and also upon the ground that the case was one involving the construction and application of the Constitution of the United States.

"The Act of March 3, 1891, chap. 517 (26 Stat. at L. 826), provides in section 6 that the circuit courts of appeals shall have appellate jurisdiction to review judgments and decrees of the circuit courts in all cases in which a direct appeal is not allowed by section 5 to this court, and that the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely on diversity of citizenship.

"The *jurisdiction* referred to is the *jurisdiction* of the circuit court as originally *invoked*. * * *

"If, *after* the jurisdiction of the circuit court *attaches* on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section 5, then the case may be brought directly to this court, although it may be carried to the circuit court of appeals, in which event, the final judgment of that court could not be brought here as of right. * * *

"The ground on which the jurisdiction of the circuit court was *invoked was solely diversity of citizenship*, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals cannot be regarded otherwise than as made final by the statute."

Huguley. Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 294.

"The plaintiff, in her *complaint, did not claim any right under the Constitution and laws of the United States*, or in any way mention or refer to that Constitution or to those laws; and at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who *invoked* the Constitution and laws of the United States."

Press Pub. Co. v. Monroe, 164 U. S. 105, 112.

The appeal from the Circuit Court of Appeals was therefore dismissed.

In

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397,

this Court had presented the question whether the judgment of the Circuit Court of Appeals was final. The suit arose under the revenue laws. This Court held that it also arose under the Constitution of the United States. The Government contended that, as the decisions of the Circuit Court of Appeals were made final in cases arising under the revenue laws, this Court had no jurisdiction to review the decree of the Circuit Court of Appeals. This Court said:

"The meaning of the words 'arising * * * under the revenue laws' in the 6th section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues, and which does not by reason of any question in it, belong also to the class mentioned in the 5th section of that act. We do not think that the words quoted necessarily embrace a case carried to the Circuit Court of Appeals, which, although arising under the revenue laws and involving a construction of those laws, depends for a full determination of the rights of the parties upon the construction or application of the Constitution or upon the constitutionality of an act of Congress. We lean to that interpretation of the act which enables the defeated party in such case in the Circuit Court of Appeals to have, as of right, upon writ of error to that court, a re-examination here of the judgment (the requisite amount being involved), if the correctness of the judgment depends in whole or in part upon the application or construction of the Constitution or upon the constitutionality of any act of Congress drawn in question."

We submit, therefore, that in this case, inasmuch as the bill of appellants invoked the jurisdiction of the Circuit Court not only upon the ground of diversity of citizenship, but also upon the ground that the case involved the construction and application of the Constitution of the United States, the decree of the Circuit Court of Appeals, *if it had jurisdiction at all*, was not final.

II.

THE BILL STATED A CASE INVOLVING THE APPLICATION OF THE CONSTITUTION OF THE UNITED STATES.

The next question to be considered is, whether the bill did invoke the jurisdiction of the Circuit Court upon the ground that the suit involved the construction or application of the Constitution of the United States.

The allegations of the bill and the law of the State of Washington, of which the Circuit Court was called upon to take judicial notice, show substantially the following facts:

Complainants were the heirs at law and next of kin of one John Sullivan, deceased, who died on the 26th day of September, 1900, in King County, Washington, leaving there a large estate, consisting of real and personal property. A special administrator of the estate of the de-

ceased was appointed. Certain persons petitioned that general letters of administration on the estate should issue, and among them was the defendant, Marie Carrau, who filed a petition setting forth that the deceased had died intestate. The several petitions were brought on for hearing in the Superior Court of the State, and in November, 1900, a general administrator of the estate was appointed, who took possession of the real and personal property (4-5).

The law of the State of Washington provides (Laws of 1895, p. 197, Sec. 1):

"When a person dies seized of lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein in fee or for the life of another, *his title shall rest immediately in his heirs or devisees*, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or any other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent; *provided, that no person shall be deemed a devisee until the will has been probated.* The title and right to possession of such lands, tenements or hereditaments so vested in such heirs or devisees, together with the rents, issues and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the executor or administrator when appointed, and persons lawfully claiming under said executor, or administrator; *and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements or hereditaments, and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the executor or*

administrator, and those lawfully claiming under such executor or administrator."

This section was construed by the Supreme Court of the State, which decided that the title passes immediately upon the death of a decedent to his heirs.

In an opinion of the Supreme Court of the State of Washington, rendered December 16, 1904,

Corcoran v. Bell, Judge, et al., 78 Pac. 945,

that court reviewed and quashed an order of the Superior Court of the State of Washington for King County, made in the matter of this same estate of John Sullivan, deceased, which order was made by the Superior Court without notice to anyone, and directed the administrator to pay himself and his attorney large sums of money out of the estate. The Supreme Court held that the order, being entered without notice to the complainants in this suit, was void, and in reaching that conclusion that court construed this section of the Act of 1895, and said:

"The funds of this estate are the property of the distributees, consisting, as they do, of the rentals of real estate, and they are entitled to be protected therein as they would be in the real estate itself. In Kruger's Estate, 55 Pac. 1056, the Supreme Court of California said:

"'An order for the payment of money, by which the property of the heirs, legatees and devisees is to be taken from them, cannot be made without notice and an opportunity to them to be heard. It cannot require the citation of authority in support of the proposition that one may not be thus deprived of his property without process of law.'

"It is also contended that the applicants have no standing here, for the reason that it has not been established that they are heirs of the estate. The application, however, states that they are such, and also that litigation is pending between them and one Marie Carrau, who claims the entire estate as aforesaid. It therefore appears that the applicants not only claim to be heirs, but that they are proceeding in an orderly manner to establish their title to the funds of the estate. As orderly claimants of the estate, it cannot be the law that pending the resistance of their claim they have no right to be heard as to the disposition that shall be made of the funds by the custodian thereof. In that event it would be possible for the entire estate to be dissipated before their rights could be finally adjudicated. Under the statute of 1895, session laws of that year, page 197, the title of lands, or any interest therein, vests immediately in the heirs. See also: Griffin v. Warburton, 23 Wash. 231; Anrud v. Scandinavian-American Bank, 27 Wash. 16.

"*Since the title vests in the heir at the time of the decedent's death, he is entitled thenceforth to be heard as to the disposition of the estate*, and the mere fact that a resistance to his claim of heirship may exist does not deprive him of such right. The administrator who seeks to pay out the funds of the estate for his own and counsel's services must recognize the right to be heard on the part of all claimants as heirs or devisees who proceed in a regular way, until conflicting claims have been finally adjudicated. It follows from the foregoing that the respondents' demurrer to the application for a writ of review, and their motion to be discharged thereon, must be overruled."

On the 8th of March, 1901, the appellee, Marie Carrau, filed her petition in the Superior Court of the State for King County, in which she alleged that the deceased, John Sullivan, the night before his death made a nuncupative will, whereby he bequeathed and devised to her his entire estate, and she prayed that the will be probated (7).

The law of Washington does not create the right to make a nuncupative will. It simply imposes additional restrictions upon the common law right.

Laws of Washington, 1854, pp. 315 and 316, Secs. 23, 24 and 25, provide:

"Sec. 23. No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, nor unless the same be proved by two witnesses who were present at the making thereof, nor unless it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, nor unless such nuncupative will was made at the time of the last sickness and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return.

"Sec. 24. Any mariner at sea, or soldier in military service, may dispose of his wages or other personal property as he might have done by common law, or by reducing the same to writing.

"Sec. 25. No proof shall be received of any nuncupative will, unless it be offered within six months after speaking the testamentary words, nor unless the words or the substance thereof be first committed to writing and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper."

Pierce's Code of Washington, Sec. 2331 (Ballinger's Code, Sec. 6083), provides:

"In all cases in which citations are issued from the Superior Court in probate proceedings, they shall be served at least ten days before the term at which they are made returnable, except when issued from the court in

cases where the law requires the judge to issue them upon his own motion, and he does so issue them; and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court."

Code 1881, Sec. 1303 (Pierce's Code, Sec. 2321), provides:

"All process issuing out of the probate court shall be attested by the clerk and sealed with the seal of the court, *and shall be served in the same manner as process issuing out of the* (Superior) *District Court*."

Where process issues out of the Superior Court of the State, and personal service cannot be made within the State, service may be made by publication, but in that event the party so served is not required to appear until sixty days from the date of the first publication. Personal service in an action *in rem* may also be made outside of the State, but in such case the person served may appear and answer at any time within sixty days after such personal service out of the State.

Pierce's Code of Washington provides:

"Sec. 335. When the defendant cannot be found within the state, of which the return of the sheriff of the county in which the action is brought that the defendant cannot be found in the county is *prima facie* evidence, and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state or cannot be found therein, and that he has deposited a copy of the summons and complaint in the postoffice, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publica-

tion of the summons by the plaintiff or his attorney in either of the following cases. * * *

"Sec. 336. The publication shall be made in a newspaper printed and published in the county where the action is brought * * * once a week for six consecutive weeks, provided that publication of summons shall not be had until after the filing of the complaint, and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. The summons must be subscribed by the plaintiff or his attorney or attorneys. The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons. * * *

Sec. 337. Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state, except it shall require the defendant to appear and answer within sixty days after such personal service out of the state."

The Superior Court of the State of Washington became the successor of the district and probate courts of the Territory. It is vested with jurisdiction in equity, at law, and in matters of probate.

Constitution of Washington, Art. XXVII, Sec. 10, and Art. IV, Sec. 6.

The bill alleged (8, 9), that immediately upon the petition being filed, a citation was issued by the Superior Court and placed in the hands of the sheriff of the county for service upon the widow and next of kin of the deceased; that the sheriff immediately returned the citation, stating

that he was unable to find any such persons in King County, and the state court immediately assumed to admit the pretended nuncupative will to probate, and that the same now stands as though legally probated, on the records of the court; that the Superior Court acted wholly without jurisdiction in assuming to probate the will; that it had no jurisdiction to hear any evidence or to take any steps for the probate of a nuncupative will, where the estate bequeathed exceeded the value of $200.00, and that it was also without jurisdiction to hear any proof for the probate of the will, for the reason that no legal citation had been issued out of the court and because ten days had not elapsed betwen the filing of the pretended will and the hearing of the proof offered in support of the same, and that a nuncupative will is, under the laws of Washington, invalid where the estate bequeathed exceeds the value of $200.00, and that even if valid it could not dispose of real estate.

The bill alleged that the defendant Carrau had filed her petition in the Superior Court of the State, praying that the entire estate, including the real and personal property, should be distributed to her, and that the Superior Court would, complainants were informed and believed, distribute the estate to her; that she was insolvent, and if she received possession of the property she would dispose of the same and put the complainants to the necessity of instituting a multiplicity of suits; that the Superior Court was without jurisdiction to distribute the real estate, or any part thereof; that the real estate and the rents and profits produced thereby since the death of the deceased, were the property of the complainants; that the adminis-

trator would obey the order of the Superior Court and surrender the real estate and the rents and profits to the defendant Carrau, and thereby the complainants would be deprived

"*of their said property without due process of law, in violation of the rights of your orators and each of them under the Fourteenth Amendment to the Constitution of the United States.*" (8, 9).

The bill further alleged that if the pretended probate be allowed to stand, the will was invalid, and that if valid it could not convey real estate; and it prayed that the defendant Marie Carrau be enjoined and restrained from receiving possession of the property or interfering with it in any manner during the pendency of the suit, and that upon final hearing she be perpetually restrained and enjoined from setting up any title or claim under the pretended will, and that the administrator be required to account to the complainants for the property. (9.)

Sec. 2671 of Pierce's Code of Washington (Ballinger's Code, Sec. 6374), provides:

"At any time after six months from the issuing letters testamentary or of administration, any heir, legatee or devisee may present his petition to the court that the legacy or share of the estate to which he is entitled may be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate."

It was under this section that the defendant Marie Carrau, as an alleged legatee and devisee of the deceased, had filed her petition praying the distribution of the estate to her, and in order to file this petition she was, of course,

bound to set up as her muniments of title, the alleged nuncupative will and the alleged decree probating the will made, on the same day the petition for probate was filed, and without notice to complainants or any one else.

The statute of 1895, above set forth, expressly provided:

"No person shall be deemed a devisee until the will has been probated."

It will be seen, therefore, that the title to the real property of the deceased had, immediately on his death, vested in complainants, and the title to the personalty had vested in the administrator on his qualification, in trust for complainants. The defendant Carrau could not divest them of that title and become a devisee and legatee, except by a decree of court probating the will. The statute above cited provided that:

"No proof shall be received of any nuncupative will unless offered within six months after speaking the testamentary words, nor unless the words or the substance thereof be first committed to writing and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper." (Pierce's Code, 2352.)

It appears from the bill that at the time it was filed more than six months had elapsed since the death of the deceased. If the alleged will had not then been probated, complainants' title to the property was absolute. Whether the alleged will had been probated or not depended on whether the court had acquired jurisdiction to render a decree probating the will. If the court had no jurisdic-

tion to probate the will, and the defendant Carrau, by using the decree of probate as a muniment of title, was about to obtain from the administrator the property in his custody belonging to the complainants, by the authority of the state court, complainants would be deprived of their property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States. In other words, the question presented by the bill was not simply whether the decree probating the will was valid or void, but, being void for want of jurisdiction in the court to render it, the attempt to take the property of the complainants by authority of the void decree and under authority of the State Court, was a violation of their rights under the Fourteenth Amendment.

In

Fayerweather v. Ritch, 195 U. S. 276,

a direct appeal from the decree of the Circuit Court of the United States had been taken into this court, on the ground that the suit was one involving the application of the Constitution of the United States. Diversity of citizenship also existed. A motion was made to dismiss the appeal.

Mr. Justice Brewer, in delivering the opinion of this court, said (p. 297):

"Our jurisdiction of this direct appeal from the decision of the Circuit Court is invoked on the ground that the case involves the application of the Constitution of the United States. The contention is that by Article 5 of the Amendments to the Federal Constitution no person can 'be

deprived of life, liberty or property without due process of law;' that these plaintiffs were entitled to large shares of the estate of Daniel B. Fayerweather; that they were deprived of this property by the judgment of the Circuit Court, which gave unwarranted effect to a judgment of the state courts; that this action of the Circuit Court is not to be considered a mere error in the progress of a trial, but a deprivation of property under the forms of legal procedure. In Chicago, Burlington, &c., Railroad v. Chicago, 166 U. S. 226, we held that a judgment of a state court might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense, was not absolutely conclusive upon the question of due process.* * *

(P 298.) "It is said that the rights of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the state was the validity of those releases; that notwithstanding this, that court came to its conclusion and rendered its judgment without any determination thereof; that the appellate courts wrongfully assumed that the trial court had decided the question, and rendered their judgments upon that asumption, so that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs to a share of the estate without any finding of the vital fact which alone could destroy their right. The contention is not that the state courts erred in their finding in respect to this fact, but that there never was any finding. Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as a conclusive determination of the fact. *Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such depriration could be justified—a case is presented coming directly within the decision in* 166 *U. S. supra. Giving effect in the Circuit Court to the*

state judgment, does not change the character of the question. It is merely adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not, is a question upon the merits, and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of the wrongful character of the proceedings in the state courts, and the necessary result therefrom. We are of opinion that the jurisdiction of this court must be sustained."

In the case now before the court, the complainants are entitled to the entire estate of John Sullivan, deceased, unless they have been deprived of that estate by the pretended nuncupative will probated by a decree founded upon fraud and manufactured evidence, rendered by a court *ex parte*, without notice to anyone and without jurisdiction to hear any proof in support of the alleged will. If the rendition of a judgment in a proceeding to which there are parties, without any determination of the issues raised, is depriving the parties, against whom the decision is rendered, of their property without due process of law, it necessarily follows that the rendition of a judgment without acquiring jurisdiction either of the subject matter or of the parties against whom the decision is rendered, is equally a depriving of those parties of their property without due process of law, and when a bill alleges those facts, and in addition thereto specifically alleges that the property of the complainants, pursuant to such proceedings, is about to be taken from them without due process of law, in violation of their rights under the Fourteenth Amendment of the Constitution of the United States, it would seem that the case at bar is much stronger in presenting a case involving

the application of the Constitution of the United States than the case of Fayerweather v. Ritch, *supra*.

In

Corcoran v. Bell, 78 Pac. 945,

in the matter of Sullivan's Estate, the Supreme Court of the State of Washington, considering the force of orders made *ex parte*, without notice to these complainants, under which orders the administrator paid out the funds of the estate to himself and his attorney, granted an order quashing the orders of the Superior Court on the application of these complainants, and said:

"It is the position of the applicants that the orders are void, as having been made without jurisdiction, for the reason that they were made entirely *ex parte* and without notice of any kind to persons interested as distributees of the estate. The principle involved seems to be so fundamental that citation of authorities is unnecessary."

If an order made without notice to these complainants, which took from them a part of the estate, was void because to give it effect would be to deprive them of their property without due process of law, it necessarily follows that a decree of probate rendered without notice to these complainants, although the statute forbade the court rendering the decree to hear any proof until they had been notified, and which deprives them of the entire estate, is void for the same reason.

In

Scott v. McNeal, 154 U. S. 34,

this court had before it on writ of error to the Supreme

Court of the State of Washington, the question whether Scott had been deprived of his property without due process of law. The court said:

"The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance, under order of the Probate Court of the County of Thurston and Territory of Washington, by an administrator of his estate, appointed by that court on April 20, upon a petition filed April 2, 1888. * * *

The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him. * * * *

The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities.

Ex parte Virginia, 100 U. S. 313, 318, 319.
Ex parte Virginia, 100 U. S. 339, 346.
Neal v. Delaware, 103 U. S. 370, 397.

And the first one, as said by Chief Justice Waite in United States v. Cruikshank, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in Bank of Columbia v. Okely, 17 U. S. 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution

of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute.

Huntington v. Attrill, 146 U. S. 657, 683, 684.
Mobile & O. R. Co. v. Tennessee, ante, p. 793.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation —to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' "

The court then held that the statute of Washington did not warrant the conclusion that the probate court was authorized to conclusively decide against a living person that he was dead, and that his estate was therefore subject to be administered on and disposed of by the probate court, and the judgment of the Supreme Court of the State of Washington affirming the judgment of the Superior Court in the

case where the record in the administration proceedings had been introduced against Scott, was reversed.

The sole ground upon which this court obtained jurisdiction on the writ of error to the Supreme Court of the State of Washington was that the judgment holding that Scott was dead, when he was in fact alive, under which judgment his property had been taken, was void, and that when that judgment was received in evidence as a muniment of title, Scott was thereby deprived of his property without due process of law.

In

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234

this court, speaking of the Fourteenth Amendment, said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state; to its legislative, executive and judicial authorities, and therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' * * *

These principles were enforced in the recent case of Scott v. McNeal, 154 U. S. 34, in which it was held that the prohibitions of the 14th Amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities, and consequently it was held that a judgment of the highest court of a state, by which a

purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law, contrary to the 14th Amendment."

In

Winsor v. McVeigh, 93 U. S. 274, 277,

Mr. Justice Field, delivering the opinion of this court, said:

"A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. *Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization, over the subject matter.*"

At page 281 of the opinion, Mr. Justice Field said, in reference to proceedings *in rem*, and after citing Woodruff v. Taylor, 20 Vermont, 65:

"The court observed that in every court and in all countries where judgments were respected, notice of some kind was given, and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*.

'A proceeding,' continued the court, 'professing to determine the right of property where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified by the name of a judicial proceedings. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court.'"

In

Earle v. McVeigh, 91 U. S. 503, 510,

this court said:

"Even in proceedings *in rem*, notice is requisite in order that the sentence may have any validity. 'Every person,' said Marshall, C. J., 'may make himself a party to such a proceeding and appeal from the sentence, but notice of the controversy is necessary in order that one may become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceding against him.'"

In

Hovey v. Elliott, 167 U. S. 409,

Mr. Justice White, in delivering the opinion of the court, said, at page 417:

"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to intlict the very wrongs which they were created to prevent.

In

Galpin v. Page, 86 U. S., 18 Wall. 350,

the court said, (p. 368):

'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. *Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.*'

Again, in

Ex parte Wall., 107 U. S. 289,

the court quoted with approval the observations as to 'due process of law,' made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case, 17 U. S., 4 Wheat. 518: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'
* * *

The necessary effect of the judgment of the Supreme Court of the District of Columbia was to decree that a portion of the award made in favor of the defendant, in other words his property, belonged to the complainants in the cause. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right

in or to this property to the complainant. *If the court had power to do this, by denying the right to be heard to the defendant, what plained illustration could there be of taking property of one and giving it to another without hearing or without process of law?"*

In

Lavin v. Emigrant Industrial Savings Bank, 18 Blatch., 1,

approved by this court in the case of Scott v. McNeal, 154 U. S. 34, the plaintiff sued to recover money deposited by him with the defendant. The answer of the defendant admitted the deposit in the years 1865 and 1866, but set up as a defense that an application had been made on the 14th of February, 1877, to the Surrogate of the City and County of New York for letters of administration upon the estate of Lavin; that the Surrogate decided that Lavin had died intestate, and he thereupon appointed Brennan administrator; that the defendant had paid the deposit to the administrator. The question before the court was whether the appointment of the administrator by the Surrogate and the payment to the administrator by the defendant was legal as against the plaintiff, or whether it would, if given effect, deprive the plaintiff of his property without due process of law, in contravention of the Fourteenth Amendment to the Constitution.

After reviewing the authorities the court said:

"For these reasons it must be held that the proceeding taken under the laws of New York, which are set up as justifying the defendant's refusal to pay to the plaintiff the amount of his deposits, is void as to him, because it would deprive him of his property without 'due process of law.'"

In

Roller v. Holly, 176 U. S. 398,

this court had before it the question whether, in an action *in rem*, the statute of Texas authorizing service of process returnable within five days to be made upon a person outside of Texas constituted due process of law, where the person served was at the time of service in Virginia. This court said:

"In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. * * *. *That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight.* * * *

Without undertaking to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, *or due process of law; that the judgment obtained upon such notice was not binding upon the defendant.*"

Complainants resided in Ireland. The statute of the State required that notice should be given to them. The least notice they were entitled to was ten days, provided the service was personal service. (Pierce's Code, Sec. 2333, *supra.*)

If personal service could not be made, then service by publication should have been made in the same manner as in an ordinary suit. (Pierce's Code, Sec. 2321, *supra.*)

Until service the Superior Court had no jurisdiction to hear proof. It had no jurisdiction to render a decree.

If five days' notice in an action *in rem* instituted in Texas did not constitute due process of law as against a person served with process in the State of Virginia, we submit that a judgment divesting the appellants, then residing in Ireland, of their title to property inherited from the deceased, John Sullivan, was not due process of law, when founded on a citation issued by a court six thousand miles distant, and returnable on the same day, but at an hour already past when the process was issued.

The complainants, as heirs at law and next of kin of the deceased, were the owners of his entire estate, and the title to the real estate had vested in them immediately upon the death of the deceased; that estate was in the custody of the administrator, who, of course, held it in trust for the heirs and next of kin. Months after the death of the deceased the appellee Marie Carran, without notice to the administrator and without notice to the complainants, and upon false testimony, procured the entry of a judgment, which, if valid, divested the title of complainants to the property of the deceased and vested it in her; and she used that decree, rendered without jurisdiction, as a muniment of title. She asserted thereunder that she was the owner of the entire estate, and she made application to the State Court to exercise its authority and require the administrator of the estate to surrender to her possession of the real and personal property.

By the entry of the decree of probate, the title to the estate, which had vested in complainants on the death of

the deceased, had become clouded. This cloud was created by the act of the State Court, and the bill alleged that under authority of the State Court the administrator was about to surrender possession of the property to the appellee. That such a decree was void is clear; the injury done thereby to complainants by impairing their title was depriving them of their property, and that deprivation had been effected without due process of law.

"The essential elements of due process of law are notice and an opportunity to defend."

Simon v. Craft, 182 U. S. 427.

THAT THE DECREE OF PROBATE WAS VOID IS CLEARLY ESTABLISHED BY THE FOLLOWING AUTHORITIES:

Dolan v. Jones, 36 Wash., p—. (Not yet officially reported. Decided February 23, 1905.)
Corcoran v. Bell, Judge, et al., 78 Pac. 945.
National Exchange Bank v. Wiley, 195 U. S. 257.
Smith v. White, 32 Wash. 414.
Ball v. Clothier, 34 Wash. 299.
In re Leonard's Will, 65 New J. L. 167.
Randolph v. Bayne, 44 Cal. 370.
Charleboise v. Bourdon, Admr., 6 Mont. 373.
Ashurst v. Fountain, 67 Cal. 18.
Spencer v. Houghton, 68 Cal. 82.
Haws v. Clark, 37 Iowa 356.
Boales v. Shales, 29 Iowa 507.
Jones & Magee Co. v. Boggs, 63 Iowa 589.
Sprole v. Marshall, 4 Iowa 344.
Hodges v. Brett, 4 Iowa 345.

Melbourn v. Fouts, 4 Iowa 346.
Ferneker v. Case, 75 Iowa 152.
Joiner v. Delta Bank, 71 Miss. 382.
Hunsaker v. Coffin, 2 Or. 107.
Northcut v. Lemery, 8 Or. 317, 323.
Lewis v. Bishop, 19 Wash. 312.
Everett Water Co. v. Fleming, 26 Wash. 364.

If, in a suit in ejectment, the admission in evidence of a judgment rendered without jurisdiction for want of notice, and therefore not constituting due process of law, is depriving the person whose rights are affected thereby of his property in a manner forbidden by the Fourteenth Amendment to the Constitution of the United States, can it be denied that to allow such judgment to be used as a muniment of title to take the property of complainants from the possession of the administrator, who holds it in trust for them, is an act equally forbidden by the amendment, and therefore one which can be prevented by injunction before it is consummated, instead of being annulled after its execution?

Vicksburg Waterworks v. City of Vicksburg, 185 U. S. 65.
Walla Walla v. Walla Walla Water Works, 172 U. S. 1.
Pac. Elec. R. Co. v. Los Angeles, 194 U. S. 112.
Pac. Gas Improvement Co. v. Ellert, 64 Fed. 421.
Nashville C. & St. L. Ry. v. Taylor, 86 Fed. 168.

In the case at bar, not only did the bill show that there was involved in the suit the application of the Fourteenth Amendment to the Constitution of the United States, but

the opinion of the Circuit Court shows that that court in effect held that to give any effect to the decree, probating the alleged will, which was rendered without notice to anyone and before the court had acquired any jurisdiction to hear any proof, would have the effect of depriving complainants of their property without due process of law. The opinion of the Circuit Court shows that the court held that while the alleged will never had been made, yet if it had been made, and if the deceased thereby had intended to convey to the defendant Marie Carrau his entire estate, the complainants could not be disinherited by the alleged will, because it had not been probated within six months from the death of the deceased. (130, 131.)

In order to hold that the alleged will had not been probated within six months after the death of the deceased the court was obliged to hold that the decree of probate was a nullity. It will be seen, therefore, that the effect of the decree of probate was a vital question in the case. If the alleged will had never been probated, then the title of complainants was absolute. If the alleged will had been probated, and if it conveyed real estate, they might have been disinherited. It appears, therefore, that not only was the application of the Constitution involved, but that the Constitution was applied by the trial court in deciding the case.

III.

THE CIRCUIT COURT OF APPEALS HAD NO JURISDICTION OF THE APPEAL FROM THE DECREE OF THE CIRCUIT COURT.

Assuming, then, that there was presented by the bill a case involving the construction or application of the Constitution of the United States, the question arises, to what court should the defendant Marie Carrau have appealed when the decree of the Circuit Court was rendered in favor of the complainants?

It is clear from the decisions of this court that if a constitutional question was presented by the bill, and the jurisdiction of the Circuit Court was invoked upon no other ground, this court would have exclusive jurisdiction of an appeal from the decree of the Circuit Court.

Union & Planters' Bank v. Memphis, 189 U. S. 71.
American Sugar Ref. Co. v. New Orleans, 181 U. S. 277.

If the jurisdiction of the Circuit Court was dependent on a federal question other than one of the those specified in Sec. 5 of the Act of March 3, 1891, then the Circuit Court of Appeals would have jurisdiction of an appeal from the Circuit Court, but its decision would not be final.

Northern Pacific R. R. Co. v. Soderberg, 188 U. S. 526.
Howard v. U. S. to the Use of David Stewart, 184 U. S. 676.

If the suit is one where the jurisdiction of the Circuit Court is invoked because the construction or application of the Constitution of the United States is involved, then it is one which may be brought directly to this court from the Circuit Court, and the whole case is open upon such appeal.

Giles v. Harris, 189 U. S. 475.
Cummings v. Chicago, 188 U. S. 410.
Pac. Elec. R. R. Co. v. Los Angeles, 194 U. S. 112.
Field v. Barber Asphalt Pav. Co., 194 U. S. 618.
Holder v. Aultman M. Co., 169 U. S. 81.
Penn Mutual Insurance Co. v. Austin, 168 U. S. 685.
Loeb v. Columbia Township, 179 U. S. 472.
Whitten v. Tomlinson, 160 U. S. 231.
Chappell v. U. S., 160 U. S. 499.
Horner v. U. S., 143 U. S. 570.

This is so, although jurisdiction also exists because of diversity of citizenship.

Fayerweather v. Ritch, 195 U. S. 276, 299.
Davis & Farnum Co. v. Los Angeles, 189 U. S. 207.
Field v. Barber Asphalt Pav. Co., 194 U. S. 618.

If diversity of citizenship is shown by the bill, and in addition thereto it appears by the bill that the case is one involving the construction or application of the Constitution of the United States, if the case should be taken to the Circuit Court of Appeals its decree would not be final, because the jurisdiction of the Circuit Court would not have been dependent entirely on diverse citizenship; and yet, a direct appeal could have been taken to this court.

In

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277,

this court said:

"The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the courts of appeals are not made final it is provided that 'there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.' (Sec. 6.)

And the right to two appeals would exist in every case (the litigated matter having the requisite value), where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the Constitution, laws, or treaties of the United States, if such cases could be carried to the circuit courts of appeals, for their decisions would not come within the category of those made final. * * * * * * And as those cases fall strictly within the terms of section 5, the appellate jurisdiction of this court in respect of them is exclusive."

In that case the court felt it necessary to modify the language which had been used in the opinion in the case of Carter v. Roberts, 177 U. S. 496, and after quoting from the opinion in the Carter case, said:

"But language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the circuit court of appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in

section 5 *may have so arisen* that a direct resort to this court might be had, does not deprive the court of appeals of jurisdiction, or justify it in declining to exercise it."

It is plain from this decision that had the Constitutional question been presented in the bill along with the claim of jurisdiction on the ground of diverse citizenship, the decision would have been that the Circuit Court of Appeals had no jurisdiction. The court was careful to point out that the Constitutional question first appeared *after* the jurisdiction of the Circuit Court had attached by reason of diverse citizenship. At page 280 the court said:

"The jurisdiction referred to is the jurisdiction of the circuit court, and as the judgment of the court of appeals is made final in all cases in which the jurisdiction of the circuit court *attaches solely by reason of diverse citizenship*, it follows that the court of appeals has power to review the judgment of the circuit court in every *such case*, notwithstanding constitutional questions may have arisen *after the jurisdiction of the circuit court attached*, by reason whereof the case became embraced by section 5."

If the mere existence of diverse citizenship was sufficient to vest jurisdiction in the Circuit Court of Appeals, regardless of the fact that the bill also invoked the jurisdiction of the Circuit Court on the ground of a constitutional question being involved, it would have been a simple matter to have said that the existence of diverse citizenship vested jurisdiction of the appeal in the Circuit Court of Appeals. It would have been entirely unnecessary to have carefully pointed out that the time when the constitutional question arose in the case was *after* the jurisdiction of the Circuit Court had *attached by reason of diversity of citizenship.*

In

Cinn. H. & D. R. Co. v. Thiebaud, 177 U. S. 615,

the Circuit Court of Appeals certified certain questions to this court, among them the following:

1. Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?

2. Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that the law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States, which might require a reversal of the judgment without reference to such constitutional questions?

3. A third question was certified, as to whether a certain instruction disclosed a case in which it was claimed that the law of a state was in contravention of the Constitution of the United States.

This court said:

"The certificate shows that no question as to the constitutionality of the statute of Indiana relied on by the plaintiff below *was raised* or considered or decided *in the circuit court*, but that the objection made its appearance for the *first time in the assignment of errors* in the circuit court of appeals.

The third question propounded in the certificate must be answered in the negative, and we do not deem it necessary to answer the others."

In that case diversity of citizenship existed. It is plain that had the constitutional question appeared in the *original pleading* invoking the jurisdiction of the Circuit Court, the Supreme Court would have passed on the jurisdiction of the Circuit Court of Appeals when that question was certified to it, or would have held that the Circuit Court of Appeals was without jurisdiction to certify. It appearing, however, that the case in the Circuit Court of Appeals was one of which it had undoubted jurisdiction, it was unnecessary to answer a question propounded on a state of facts not in the case.

In

Union & Planters' Bank of Memphis v. Memphis,
189 U. S. 71,

diversity of citizenship did not exist. The jurisdiction of the Circuit Court had been maintained. An appeal from the Circuit Court had been taken to the Supreme Court of the United States. An appeal had also been taken to the Circuit Court of Appeals, which had affirmed the decree of the Circuit Court. From the decree of the Circuit Court of Appeals an appeal had been taken to this court. Mr. Chief Justice Fuller, in delivering the opinion of this court, said:

"Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court

under section 5 of the Judiciary Act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), and not to the circuit court of appeals. American Sugar Ref. Co. v. New Orleans, 181 U. S. 277. Nevertheless, an appeal having been prosecuted to the latter court, and having there gone to decree, an appeal was allowed to this court because the judgment was not made final in that court by Sec. 6 of the act. But the case being here, and the jurisdiction of the circuit court having depended on the sole ground that it arose under the Constitution, we are constrained to reverse the decree of the circuit court of appeals, not on the merits, but by reason of the want of jurisdiction in that court. *If this were not so, the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the act.*"

If, in addition to the constitutional question, diversity of citizenship had existed, the decision of the Court of Appeals would not have been final, because the jurisdiction of the Circuit Court would not have been dependent entirely upon diversity of citizenship, and the case would also have been one wherein an appeal would lie directly from the decree of the Circuit Court to this Court. If, therefore, the reason for denying jurisdiction to the Circuit Court of Appeals was that if it exercised jurisdiction the right to two appeals would exist, then it follows that the same reason applies when the diversity of citizenship exists along with a constitutional question, equally with a case in which the constitutional question is the only ground on which jurisdiction is invoked.

The citation of the American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, in support of the statement of the opinion that unless jurisdiction was denied to the Circuit Court of Appeals in such case, the right to two appeals

would exist, shows clearly that the Circuit Court of Appeals has jurisdiction of cases in which a direct appeal will lie to the Supreme Court of the United States, *only when*, if a decision is rendered by the Circuit Court of Appeals, its decision is final because the jurisdiction of the Circuit Court is *invoked on the ground of diversity of citizenship only*, and the constitutional question appears *later* in the case.

The various Circuit Courts of Appeals have placed this construction upon the decision of this court in American Sugar Ref. Co. v. New Orleans, *supra*.

In

Keyser v. Lowell, 117 Fed. 400,

the Circuit Court of Appeals for the Eighth Circuit, in maintaining its jurisdiction, said:

"Where the jurisdiction of the circuit court *originally attaches solely by reason of diverse citizenship*, and a constitutional question *subsequently arises*, the circuit court of appeals has jurisdiction to review the decision of that questions below, and to finally determine it. American Sugar Ref. Co. v. City of New Orleans, 181 U. S. 277."

In

City of Owensboro v. Owensboro Water Co., 115 Fed. 318,

the Circuit Court of Appeals for the Sixth Circuit dismissed an appeal for want of jurisdiction. Diversity of citizenship did not exist. The jurisdiction of the Circuit

Court had been invoked only because of the constitutional question. The court said:

"The question is, therefore, whether the appeal in this case is one comprehended within the classes of cases enumerated by section 5 of the act referred to. If it is, it must be taken to the Supreme Court, for it is only of such cases as remain after those enumerated in section 5 have been carved out of the whole body of appellate cases that the circuit courts of appeals have jurisdiction; and, as was said by Chief Justice Fuller in American Sugar Refining Co. v. City of New Orleans, 181 U. S. 277: 'Where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the constitution or some law or treaty of the United States, (Water Co. v. Keyes, 96 U. S. 199; Blackburn v. Gold Min. Co., 175 U. S. 571; W. U. Tel. Co. v. Ann Harbor R. Co., 178 U. S. 239),' such a case falls within the exclusive appellate jurisdiction of the supreme court. Looking at the language of the act, we can see no good reason for thinking that the destination of the appeal is altered by the circumstance that other questions besides those enumerated in section 5 are comprehended in the controversy which the case presents. It is still, and none the less, a case in which a question arises of the character specified in designating what cases must go by appeal or writ of error to the supreme court. The appeal or writ of error in all cases, in which no question of the character described in section 5 is involved, goes to the circuit court of appeals under the operation of section 6, which expressly bounds the appellate jurisdiction of the latter court in that way."

At page 323, the court says:

"But if the original jurisdiction is founded *entirely* upon the ground of *diversity of citizenship*, and a constitutional question *becomes involved*, the appeal might go

to *either* court. If it should go to the supreme court, that court would, of course, decide the whole case; if to the court of appeals, that court might also decide the whole case, or certify the constitutional question to the supreme court, and, on receiving its answer, decide the case. If it should decide the constitutional question in the first instance, the unsuccessful party might apply for the writ of *certiorari* under the provision of the sixth section to correct any mistake made by the court of appeals upon the subject. Thus is accomplished the whole scheme by which congress intended to give to the supreme court, by one method or another, appellate power over all constitutional questions."

In

City of Owensboro v. Owensboro Water Co., 191 U. S. 358,

this court reversed the decree of the Circuit Court on a direct appeal. In the statement of the case this court makes the following statement:

"The city then took an appeal to circuit court of appeals. The appeal was dismissed on the ground that the jurisdiction of the circuit court having been invoked on a constitutional question, the appeal should have been taken directly to this court. 53 C. C. A. 146, 115 Fed. 318. The city then brought the case here from the circuit court."

Inasmuch, however, as the decree of the Court of Appeals, if it had jurisdiction, would be subject to review by this court in a case where the jurisdiction of the Circuit Court was founded both on diversity of citizenship and on the ground that a constitutional question was involved, and inasmuch as the Supreme Court would also have jurisdiction to review the decree of the Circuit Court on direct appeal therefrom, and as the Supreme

Court would have jurisdiction of the entire case, whichever court it came from, it is clear that there is just as much reason for denying the jurisdiction of the Circuit Court of Appeals in a case where jurisdiction of the Circuit Court is invoked both on the ground of diversity of citizenship and on the ground of a constitutional question being involved, as in a case where the jurisdiction of the Circuit Court is invoked solely on the ground of a constitutional question being involved.

In

Ill. Cent. R. R. Co. v. Adams, 180 U. S. 28,

diversity of citizenship existed. A temporary injunction was granted. An appeal was taken to the Circuit Court of Appeals. That court dismissed the appeal on the ground that a constitutional question was involved. (93 Fed., 852). The Circuit Court dismissed the suit for want of jurisdiction. An appeal was then taken to this court from the decree of the Circuit Court, and the question of jurisdiction certified. This court held that the Circuit Court had jurisdiction both on the ground of diverse citizenship and because of a question arising under the constitution of the United States.

In the case of

Wright v. McFarlane & Co., 122 Fed. 770,

the Circuit Court of Appeals for the Ninth Circuit dismissed an appeal for want of jurisdiction, and while it is true that in that case diversity of citizenship did not

exist, the opinion of the court shows that it would have made no difference had diversity of citizenship existed.

In commenting upon the case of Penn. Mutual Life Insurance Co. v. Austin, 168 U. S. 685, the court said:

"It will be observed that in this case the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship of the parties to the action, but the bill disclosed a second ground of jurisdiction in the allegations claiming that the ordinances of the city and law of the state were in contravention of the Constitution of the United States. These allegations presented a case in which the jurisdiction of the Circuit Court was not entirely dependent upon the opposite parties to the suit or controversy being citizens of different states, and therefore, under section 5 of the Act of March 3, 1891, the Supreme Court had exclusive appellate jurisdiction."

After citing the case of American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, and giving the history of that case, the court proceeded:

"The Supreme Court was then petitioned for a writ of *certiorari* or *mandamus*, to compel the Circuit Court of Appeals to try the cause. The writ of *certiorari* was issued, the court holding that under sections 5 and 6 of the Act of March 3, 1891, the Circuit Courts of Appeals have power to review judgments of the Circuit Courts *when the original jurisdiction attaches solely by reason of diverse citizenship, notwithstanding the fact that constitutional questions may have arisen after the jurisdiction of the Circuit Court attached:* and that in all such cases the judgments of the Circuit Courts of Appeals are made final, and no review would be made by the Supreme Court, unless the constitutional questions involved therein were certified to that court by the Courts of Appeals. It was declared that the intention of the act was to distribute the appellate jurisdiction, and not in general to permit two appeals; that, in accordance with this intention, where

a case appeared from the pleadings to really and substantially involve a controversy as to a right depending upon the construction or application of the Constitution or some law or treaty of the United States, it fell strictly within the terms of section 5 of the Act, and the appellate jurisdiction of the Supreme Court in respect to such case was exclusive. The ruling was followed and approved in Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 295. See also *ex parte* Lennon, 150 U. S. 393, 399; Osborne v. Florida, 164 U. S. 650, 656.

"The decisions of the Supreme Court in these cases clearly establish the *line* of appellate jurisdiction between the Circuit Courts of Appeals and the Supreme Court of the United States where a constitutional question is involved, and determine that, where the jurisdiction of the Circuit Court is originally invoked upon the ground that the controversy is as to a right depending upon the construction or application of the Constitution or some law or treaty of the United States, then the appellate jurisdiction of the Supreme Court in respect to such case is exclusive, and the Circuit Courts of Appeals have no jurisdiction to hear and determine the appeal."

In

Howard v. U. S. to the use of Stewart, 184 U. S. 676,

diversity of citizenship existed. Jurisdiction also appeared in the Circuit Court because the suit was upon the bond of a Clerk of the United States Court. The case was one, therefore, which could not be brought directly to this court from the Circuit Court, because it involved the construction of a *statute* of the United States. The jurisdiction of the Circuit Court of Appeals, however, was not final, because the jurisdiction of the Circuit Court did not depend entirely upon diversity of citizenship. Mr. Justice Harlan was careful to point out that the case was

one which could not have been brought directly to this court. If the case had been one which could have been brought directly to this court, and had also been one of which the Circuit Court of Appeals was granted jurisdiction, then the decision of the Circuit Court of Appeals would have been final. At page 681, Mr. Justice Harlan said:

"It results that, although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon Federal grounds. *And as the case was one which could not have been brought here directly from the circuit court, the final judgment of the circuit court of appeals could be reviewed in this court upon writ of error sued out by the defendants.*"

It is respectfully submitted that the foregoing authorities establish the following rules of construction of the Act of March 3, 1891, with reference to the jurisdiction of this Court and of the Circuit Courts of Appeals:

1. When the jurisdiction of the Circuit Court is invoked on the ground of diverse citizenship only, and the jurisdiction is not in issue in the Circuit Court, the Circuit Court of Appeals has final jurisdiction of all questions in the case, on an appeal being taken to that court.

2. When the jurisdiction of the Circuit Court is invoked upon the ground of diverse citizenship and also upon grounds other than those mentioned in section 5, and the jurisdiction of that Court is not in issue there, then the Court of Appeals has appellate jurisdiction and the Supreme Court has no direct appellate jurisdiction, but the decree of the Circuit Court of Appeals is not final, be-

cause the jurisdiction of the Circuit Court was not dependent entirely upon diverse citizenship.

3. When the jurisdiction of the Circuit Court is invoked, not on the ground of diverse citizenship nor upon any ground mentioned in section 5, but upon the ground that the suit arises under the laws of the United States, and the jurisdiction of the Circuit Court is not in issue there, then the Circuit Court of Appeals has appellate jurisdiction, and the Supreme Court has no direct appellate jurisdiction, but the decree of the Circuit Court of Appeals is not final.

4. When the jurisdiction of the Circuit Court is invoked solely upon the ground that the case is one arising under the 4th, 5th or 6th subdivision of section 5 of the Act of March 3, 1891, then the jurisdiction of the Supreme Court is exclusive, and the Circuit Court of Appeals is without jurisdiction.

5. When the jurisdiction of the Circuit Court is invoked both on the ground of diverse citizenship, and also upon one of the grounds mentioned in the 4th, 5th or 6th subdivision of section 5, then the case must be taken directly to the Supreme Court, and the Circuit Court of Appeals has no jurisdiction.

6. When the jurisdiction of the Circuit Court is invoked solely upon the ground of diversity of citizenship, and in the progress of the case a question arises which, if pleaded in the bill, would have given exclusive jurisdiction on appeal to the Supreme Court, then jurisdiction may be exercised directly by the Supreme Court, or by

the Circuit Court of Appeals. If an appeal in such case should be taken to the Circuit Court of Appeals, its decree would be final, because the jurisdiction of the Circuit Court was dependent entirely upon diversity of citizenship.

7. When the jurisdiction of the Circuit Court is in issue in that court, the Circuit Court of Appeals is without jurisdiction to decide that question.

This construction of the Act will accomplish the purpose of preventing two appeals where a direct appeal could have been taken to this court. In other words, the only case in which an appeal from the decree of the Circuit Court of Appeals to this court will lie as a matter of right, is when the question involved cannot be determined on a direct appeal from the decree of the Circuit Court to this Court. On the other hand, the Circuit Court of Appeals has no jurisdiction of a question which can be determined on a direct appeal to this Court unless the decree of the Circuit Court of Appeals will be final if an appeal be taken to that Court. To hold, however, that the mere existence of diversity of citizenship is sufficient to vest the Circuit Court of Appeals with jurisdiction of an appeal in a case where the jurisdiction of the Circuit Court was invoked upon constitutional grounds, as well as upon the ground of diversity of citizenship, is to frustrate what this Court has repeatedly decided was the express intention of the act, namely, to prevent two appeals.

We submit, therefore, that inasmuch as the jurisdiction of the Circuit Court was originally invoked on the

ground that the case was one involving the application of the Constitution of the United States, the Circuit Court of Appeals was without jurisdiction of the appeal from the decree of the Circuit Court.

IV.

ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE JURISDICTION OF THE CIRCUIT COURT WAS INVOKED SOLELY ON THE GROUND OF DIVERSITY OF CITIZENSHIP, STILL THE CIRCUIT COURT OF APPEALS HAD NO JURISDICTION TO DETERMINE THE QUESTION OF THE JURISDICTION OF THE CIRCUIT COURT, BECAUSE THE JURISDICTION OF THAT COURT WAS IN ISSUE IN THE CIRCUIT COURT.

The defendant, Marie Carrau, in the Circuit Court filed a motion to dismiss because the matters pleaded in the bill were "not cognizable in the Federal Court," and also another motion that the action abate "for the reason that this Court has no jurisdiction of the subject matter of this action." The jurisdiction of the Circuit Court, therefore, as a Federal Court, was in issue. It is true that that Court sustained the jurisdiction.

Section 5 of the Act of March 3, 1891, is as follows:

"That appeals or writs of error may be taken from the District Courts, or from the existing Circuits, direct to the Supreme Court, in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. * * *

"Sec. 6. That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

The Circuit Court of Appeals for the Second Circuit uniformly holds that it, while having jurisdiction of the case, has no jurisdiction to decide the question of jurisdiction when the jurisdiction of the Circuit Court was in issue in the Circuit Court.

In

Sun Printing & Pub. Ass'n v. Edwards, 194 U. S. 377,

the Circuit Court of Appeals for the Second Circuit certified to this Court the question of the jurisdiction of the Circuit Court. In the certificate the following statement was made:

"Upon examination of the record it appears that in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the Circuit Court is in issue. Under Sections 5 and 6 of the Act of March 3, 1891, writs of error

in such cases are to be taken direct to the Supreme Court, *and the grant of appellate jurisdiction to the Circuit Courts of Appeal does not include such cases.*

"In accordance, therefore, with the practice indicated in Cincinnati, H. & D. Co. v. Thiebaud, 177 U. S. 615, and American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, and followed by this Court in U. S. v. Lee Yen Tai, 51 C. C. A. 299, this Court elects to reserve judgment upon the other questions, and to certify the question of jurisdiction to the Supreme Court."

In answering the question of jurisdiction certified, this Court did not comment upon the statement of the Circuit Court of Appeals for the Second Circuit, to the effect that the determination of the question of jurisdiction where the jurisdiction of the Circuit Court was in issue, was not within the grant of appellate jurisdiction to the Circuit Courts of Appeal.

In

Fisheries Co. v. Lennen, 130 Fed. 533,

decided April 21, 1904, the Circuit Court of Appeals for the Second Circuit said:

"The first assignment is based upon the contention that the Circuit Court had no jurisdiction because the matter in demand does not exceed $2000. Under the construction adopted in this Circuit of the sixth section of the Evarts Act (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]), the question of the jurisdiction of the court below is not before us for review. United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299."

In

U. S. v. Lee Yen Tai, 113 Fed. 465,

the Circuit Court of Appeals for the Second Circuit, in considering the question of its jurisdiction to decide a constitutional question, said:

"The Circuit Court of Appeals has no jurisdiction in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty is drawn in question. In such cases an appeal or writ of error lies directly to the Supreme Court, and the Circuit Court of Appeals can only exercise appellate jurisdiction in cases other than those. Authority, however, is given the Circuit Court of Appeals in every 'subject within its appellate jurisdiction' to certify to the Supreme Court any question of law concerning which it desires the instruction of that Court 'for its proper decision.' Act of March 3, 1891, Sec. 6. The Supreme Court in several cases has held that, although a case which has been brought to the Circuit Court of Appeals by an appeal or writ of error may involve a question which that Court has no jurisdiction to entertain, it may, nevertheless, if the case also involves other questions, determine those questions, and certify to the Supreme Court the question which it may not entertain. U. S. v. Jahn, 155 U. S. 109; Carter v. Roberts, 177 U. S. 496."

After quoting from the Carter case, the Circuit Court of Appeals proceeded:

"This language is relied upon by counsel for the appellant as meaning that the Circuit Court of Appeals may in deciding the whole case decide the constitutional question, or, as in this case, a question involving the construction of a treaty. We do not regard it as intended to bear that meaning, and, as we read the language, it means simply that the Circuit Court of Appeals may decide the whole case by affirming or reversing the decision under review

without passing upon the constitutional or treaty question, or, if it sees fit, may reserve judgment and certify that question."

In

St. Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 196,

the Circuit Court of Appeals for the Eighth Circuit dismissed an appeal for want of jurisdiction, and said:

"Act of March 3, 1891, c. 517, 26 Stat. 826, which created the Circuit Courts of Appeals, provides in section 5 (26 Stat. 827), that 'appeals or writs of error may be taken from * * * the existing Circuit Courts directly to the Supreme Court * * * in any case in which the jurisdiction of the Court is in issue,' and in section 6 (26 Stat. 828), that the Circuit Courts of Appeals 'shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the * * * existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.' If, therefore, a writ of error could have been taken from the Supreme Court directly to the Circuit Court to review the question here presented under section 5 in this suit, this is not one of the other cases of which this court is given jurisdiction."

At page 201, the Court said:

"The second objection to the dismissal of the writ is that the Circuit Courts of Appeals are given jurisdiction by section 6 of the Act creating them to review all jurisdictional questions which arise in the Circuit and District Courts of the United States in cases in which their jurisdiction is based solely on diversity of citizenship. A careful reading of section 6, however, discloses no such grant of power. Upon this subject that section provides only that the Circuit Courts of Appeals 'shall exercise appellate

jurisdiction to review by appeal or writ of error final decision in the * * * existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final * * * in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States.' *But it is only in cases not provided for by the preceding section that the Circuit Courts of Appeals are given appellate jurisdiction, and no case in which jurisdiction of the Circuit Court is in issue falls in the class of cases not provided for by section* 5."

At page 262, the Court said:

"Section 6 does provide that in cases in which the jurisdiction of the Circuit Court is founded on diversity of citizenship the judgments and decrees of the Circuit Courts of Appeals shall be final. *But this provision in no way limits the jurisdiction of the Supreme Court under section* 5, *nor does it enlarge the appellate jurisdiction of the courts of Appeals.* * * *

"The cases of American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 281, and Ayres v. Polsdorfer, 187 U. S. 585, do not lead to a different result. The question there considered was the jurisdiction of the Circuit Courts of Appeals to hear and determine constitutional questions arising in cases in which the jurisdiction of the Circuit Courts was founded on diversity of citizenship. The jurisdiction of the Circuit Courts over the subject matters and the parties to the suits was not challenged or in issue in those cases, and, as the Supreme Court well said in Ayres v. Polsdorfer, at page 595, 187 U. S., 'as to such questions other rules apply than those we have expressed in this opinion.'"

In this connection it should be borne in mind that the real question in the case of

McLish v. Roff, 141 U. S. 661,

which was the first decision rendered by this Court construing the Act of March 3, 1891, establishing the Circuit Courts of Appeals, was whether the question of the jurisdiction of the Circuit Court could be certified to this Court before final judgment. That was the only question involved in that case.

In the case of

U. S. v. Jahn, 155 U. S. 109,

the jurisdiction of the Circuit Court was *not in issue in that Court*. The case, therefore, did not fall within the first subdivision of section 5. It was not a case, therefore, in which a direct appeal could have been taken to this Court on the jurisdictional question. The Circuit Court of Appeals, therefore, had undoubted jurisdiction to determine the question of jurisdiction, because in the Circuit Court the case contained none of the questions provided for by section 5. Notwithstanding that fact, this Court said:

"It is conceded that the United States assigned errors on the merits, as well as the error under consideration, and as the question of *jurisdiction* lay at the threshold, and the *intent* of the Act of March 3, 1891, was *that that question should be determined by this Court*, the Circuit Court of Appeals properly suspended any consideration of the case upon the merits until that question could be determined upon certificate."

As stated, in the Jahn case, the jurisdiction of the Circuit Court *was not in issue in the Circuit Court*. The

first subdivision of section 5 of the Act of March 3, 1891, specifically provides that a direct appeal may be taken to this Court in all cases where the jurisdiction of the Circuit Court is in issue. The grant of appellate jurisdiction to the Circuit Court of Appeals is in other cases than those provided for in section 5, and, as stated in

St. Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 196,

"*But it is only in cases not provided for by the preceding section that the Circuit Courts of Appeals are given appellate jurisdiction, and no case in which jurisdiction of the Circuit Court is in issue falls in the class of cases not provided for by section 5.*"

It is, therefore, respectfully submitted that the Circuit Court of Appeals had no jurisdiction to determine that the Circuit Court had no jurisdiction, when the jurisdiction of the Circuit Court *was in issue in the Circuit Court.*

We submit, therefore, that as the Circuit Court of Appeals had no jurisdiction of the question of the jurisdiction of the Circuit Court, and as that was the only alleged error properly assigned, the decree of the Circuit Court of Appeals should be reversed with directions to dismiss the appeal of Marie Carrau.

V.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON HAD JURISDICTION OF THE SUBJECT MATTER OF THE SUIT, AND OF ALL NECESSARY PARTIES.

A.

WHEN A PROCEEDING INTER PARTES CAN BE MAINTAINED IN A STATE COURT, BY WHATEVER NAME THE STATE COURT MAY BE CALLED, FOR THE ANNULMENT OF A WILL AND ITS PROBATE, A SUIT FOR THE SAME RELIEF MAY BE MAINTAINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SAME STATE, IF THE OHER JURISDICTIONAL REQUISITES EXIST.

The Circuit Court of Appeals for the Ninth Circuit, in an opinion delivered by Judge Knowles and concurred in by Mr. Justice McKenna, then Circuit Judge, said, in the case of

Richardson v. Green, 61 Fed. 423, 428:

"It should be observed also that when it is customary for such state courts to hear and determine such equitable suits, a United States Court, under proper conditions, may hear them. *It is not necessary that a statute should exist authorizing the same.* The suit in the county court of Oregon in such matters is not authorized directly by any statute, but is a customary exercise of jurisdiction. * * *

"In the Broderick will case *it was admitted* if a state by statute authorized the bringing of a suit to declare a will void in its courts of law or equity, the same could be maintained in a proper case in a Federal court."

Again, in the same opinion, the court said:

"Here it will be seen that if a suit is essentially a suit of a *civil nature, for equitable relief*, and it is customary to prosecute the same in *any* state court where the action arose, whether the same is a county court *or a probate court* or a District or Circuit Court, the proper Federal Court will have concurrent jurisdiction of the same with such state courts, where the amount is sufficient and the parties are citizens of different states as prescribed by the United States statutes."

In the concurring opinion, Judge McKenna, at page 435, said:

"A suit, however, may be maintained in the county court, to declare the will void and revoke its probate. Clark's Heirs v. Ellis, 9 Or. 132, and cases *supra*. The nature of this suit is not precisely defined by the decisions, but it is certainly *inter partes*, and seems to be within the doctrine declared in Ellis v. Davis, 109 U. S., 496, 497; 3 Sup. Ct. 327. This *remedy* existing in the Oregon courts, it could be exercised by the United States Circuit Court."

The Circuit Court of Appeals therefore affirmed the decree of the Circuit Court for the District of Oregon, adjudging, in a suit brought by the heirs of a decedent, that an alleged will was forged and its probate fraudulently obtained, and enjoining the persons claiming thereunder from setting up any title to the estate of the deceased under the will and its probate.

The defendants applied to the Supreme Court for a writ of *certiorari*, upon the single ground that there was no law in the State of Oregon authorizing the maintenance of a suit in the courts of the state to annul a will and its probate; that a proceeding to annul a will and its probate was in effect one requiring the re-probate of the will; that it could be entertained by the county court only in the exercise of probate jurisdiction, and that for that reason jurisdiction did not exist in the Circuit Court of the United States for the District of Oregon to entertain a suit for the annulment of a will and its probate. (Petition for writ of *certiorari* in Richardson v. Green, p. 4.) Counsel for the petitioners in that case said, at page 1 of their brief:

"The Circuit Court of the United States for the District of Oregon is without jurisdiction to decree a will invalid and cancel the same, none of the courts of the State of Oregon having jurisdiction to entertain a suit between parties for such relief."

The application for the writ of *certiorari* was denied by this Court.

Richardson v. Green, 159 U. S. 264.

THE DENIAL OF THE WRIT OF CERTIORARI WHERE THE QUESTION SOUGHT TO BE REVIEWED WAS THE JURISDICTION OF THE CIRCUIT COURT OF THE UNITED STATES TO ENTERTAIN THE SUIT, MUST BE TAKEN AS AN AFFIRMANCE BY THIS COURT OF THE JURISDICTION OF THAT COURT.

This is the view which has always been taken of that case.

In

Wart v. Wart, 117 Fed. 766,

the court, in following Richardson v. Green as establishing the jurisdiction of the Circuit Courts of the United States to entertain such suits, said:

"In Richardson v. Green, 9 C. C. A., 565, 61 Fed. 423, this question is discussed at length, the conclusion reached being that under the laws of Oregon a proceeding to contest the validity of a will could be instituted after the probate thereof, and that if the adversary parties were citizens of different states and the amount involved was sufficient to meet the requirements of the judiciary act, a court of the United States could take jurisdiction over such a controversy. *An application was made to the Supreme Court for the purpose of bringing this case by means of a writ of certiorari before that court, but the application was denied. Richardson v. Green*, 159 U. S., 264; 15 Sup. Ct. 1042, 40 L. Ed. 142. *The denial of the writ when the question involved was that of jurisdiction, must be taken to be in effect an approval of the ruling of the Court of Appeals.*"

The court, therefore, held that the *statutory right* given by section 3296 of the Code of Iowa to contest a will and its probate, was a right enforceable in the courts of the United States when the other jurisdictional requisites existed. The court said:

"*A proceeding thus brought to contest the validity of a will presents a controversy between adversary parties, of which a court of the United States may take jurisdiction, provided the requisite amount is involved and a diversity of citizenship exists between the litigant parties.*"

In

Williams v. Crabb, 117 Fed. 193,

the Circuit Court of Appeals for the Seventh Circuit, in asserting the jurisdiction of the Circuit Court to entertain a suit to set aside a will and its probate, said, in following the decision in Richardson v. Green:

"*It is well settled that rights and remedies, legal or equitable, provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the Federal Courts*, and that the terms 'law' and 'equity' as used in the Constitution, although intended to mark a distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well *not only rights newly created by the statutes of the state, but new forms of remedies to be administered in the courts of the United States according to the nature of the case. A state cannot, by its legislature, confer a substantive right or remedy in the way of a suit inter partes, upon its own citizens, that will not be available to the citizens of the other states; nor can it by any device restrict such right or remedy thus made available to enforcement in its own courts, the conditions of citizenship being such that they would otherwise be enforceable in the Federal Courts.* By any other view it would be in the power of a state by legislation to deprive citizens of other states either of the new right or remedy given by the state statute, or of the forum granted by the Federal Constitution and laws. The citizen of another state cannot be compelled to make such an election, or to accept a remedy upon condition that he forego the constitutional forum to which he would otherwise be entitled."

Certiorari was applied for and denied in this case.

Crabb v. Williams, 187 U. S. 645.

In

Sawyer v. White, 122 Fed. 223,

the Circuit Court of Appeals for the Eighth Circuit had before it the question of the jurisdiction of the Circuit Court to set aside a will and its probate on the ground that the execution of the will had been procured by undue influence. The court said:

"The action to contest the validity of this will *is a statutory proceeding*, under sections 4622, 4623, 1 Rev. St. Mo., 1899, p. 1102, which provide that any person interested in the probate of any will may contest its validity by a petition to the Circuit Court of the State, filed within five years after the will is probated. * * *

"*As the parties to this action were citizens of different states the Federal Court had jurisdiction to hear and determine this issue under the familiar rule that rights created and remedies provided by the statutes of a state to be pursued in the state court may be enforced and administered in the national courts either at law, in equity or in admiralty, as the nature of the rights or remedies may require.* Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 14, 23, C. C. A. 609, 616; Gaines v. Fuentes, 92 U. S. 10, 20, 23, L. Ed. 524; Richardson v. Green, 9 C. C. A. 565, 571, 578, 61 Fed. 423, 429, 435; Brodhead v. Shoemaker (C. C.) 44 Fed. 518, 11 L. R. A. 567; in re Stutsman County (C. C.) 88 Fed. 337, 341; Ellis v. Davis, 109 U. S. 485, 497, 3 Sup. Ct. 327, 27 L. Ed. 1006; Railway Co. v. Whitton, 13 Wall. 270, 278, 287, 20 L. Ed. 571; Cummings v. Bank, 101 U. S. 153, 157, 25 L. Ed. 903; Davis v. Gray, 16 Wall. 203, 221, 21 L. Ed. 447; Broderick's Will, 21 Wall. 503, 520, 22 L. Ed. 599; Gormley v. Clark, 134 U. S. 338, 348, 10 Sup. Ct., 554, 33 L. Ed. 909; Cowley v. Railroad Co., 159 U. S. 569, 582, 16 Sup. Ct. 127, 40 L. Ed. 263; National Surety Co. v. State Bank of Humboldt (C. C. A.) 120 Fed. 593."

Barber Asphalt Paving Co. v. Morris, Judge, 132 Fed. 945.

It is clear that the courts of the United States, other than the present Circuit Court of Appeals for the Ninth Circuit, understood when they followed the decision in Richardson v. Green, 61 Fed. 423, that that decision held that when a proceeding could be maintained in the courts of a State to annul a will and its probate, a suit to enforce the same rights could be maintained in the Circuit Court of the United States sitting in such State, and that it was immaterial whether the right to maintain such a proceeding in the courts of the State was created by *a customary exercise of jurisdiction, or by statute.* This is certain, because the jurisdiction upheld in Wart v. Wart, 117 Fed. 766, was founded upon section 3296 of the Code of Iowa; in Sawyer v. White, 122 Fed. 223, the jurisdiction upheld was founded upon sections 4622, 4623, I Rev. St. Mo. 1899, p. 1102; and in Williams v. Crabb, the jurisdiction was founded upon section 7 of chapter 148, Rev. St. of Ill.

In

Richardson v. Green, 61 Fed. 423,

the claim was made that the Circuit Court of the United States for the District of Oregon had no jurisdiction to entertain such a suit, *because there was no statute in Oregon authorizing a court of the state to entertain such a suit.* At page 428, the court said:

"It is not *necessary* that a statute should exist authorizing the same. * * * In the Broderick Will case *it was admitted* if a *state statute authorized* the bringing of a suit to declare a will void in its courts of law or equity, the same could be maintained in a proper case in the Federal Court."

It was *conceded* that if there *was a statute* of the state authorizing such a suit, then the Circuit Court of the United States had concurrent jurisdiction with the courts of the state. It was held by the court that if it was customary for the courts of the state to entertain such suits, then, even if there were no statute, the Circuit Court of the United States had *concurrent jurisdiction.*

In the case at bar the Circuit Court of Appeals holds that *because there is a statute* which authorizes a proceeding *inter partes* in the Superior Courts of the State of Washington exercising general jurisdiction, the Circuit Court of the United States for the District of Washington *is excluded from exercising concurrent jurisdiction with the state court.*

In Oregon the only court of the State having jurisdiction to entertain a contest of a will admitted to probate was a county court.

It is important, therefore, to determine the exact jurisdiction of the county court of Oregon.

"The county court shall have the *jurisdiction pertaining to probate courts* and Boards of County Commissioners, and such other powers and duties *and such civil jurisdiction, not exceeding the amount of value of* $500.00, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law."

Article 7, section 12, Constitution of Oregon.

"The county court is created by the organic law of the state (Art. 7 Const.), and its organization is provided

for *and its jurisdiction limited and defined by such organic law* and the provisions of this title. * * *"

Sec. 893 Hill's Annotated Laws of Oregon.

Sec. 867 Deady's General Laws of Oregon.

"The county court has jurisdiction, but not exclusive, of *actions at law* and all proceedings therein and connected therewith, where the claim or subject of the controversy *does not exceed the value of five hundred dollars* * * *."

Sec. 894 Hill; 868 Deady.

"The county court *has exclusive jurisdiction in the first instance pertaining to a court of probate*, that is

1. *To take proof of wills.*

2. *To grant and revoke letters testamentary, of administration*, or of guardianship * * *."

Sec. 895 Hill; 869 Deady.

It thus appears that not only was there no grant to the county court of Oregon of equity jurisdiction, but all civil jurisdiction granted to the county court, outside of its probate jurisdiction, was expressly limited to five hundred dollars, and that jurisdiction was only conceded to it in actions at law. It is plain, therefore, that the authority for upholding the jurisdiction of the Circuit Court of the United States for the District of Oregon, in the case of Richardson v. Green, was not based upon the proposition that the county court could entertain a suit either at law or in equity to annul a will and its probate. *The authority for upholding the jurisdiction of the Circuit Court, in that case, rested solely on the ground that the proceeding was*

inter partes. This clearly appears from the cases cited by Judge McKenna to establish the character of the proceeding customarily instituted in the county courts of Oregon.

In

Heirs of Clark v. Ellis, 9 Ore. 128,

the Supreme Court of Oregon said:

"The chief objection made upon the argument of the demurrer was that the county court had no jurisdiction of the subject matter, that the jurisdiction to annul wills *is not a matter pertaining to probate*, and is not vested in the county court either by the Constitution or by statute, and that original jurisdiction of such causes belongs to the Circuit Court. * * *

"The jurisdiction of the county court in a proper proceeding to set aside a will and to revoke letters testamentary, is not questioned. * * * *The re-probate* required when the validity of the will is attacked, the issue formed in every such proceeding, of which the party propounding the will has the *onus probandi, is a subject matter of the same jurisdiction as the probate of a will of which the county court has the exclusive jurisdiction in the first instance under the statute above cited.*"

In

Kieley v. McGlynn, (Broderick's Will), 21 Wall. 503,

this Court affirmed a decree which dismissed a bill filed in the Circuit Court of the United States for the District of California, instituted to set aside a will and its probate. The statutory time for attacking the will and its probate in the probate court had elapsed long prior to

the institution of the suit. Complainants were not in possession of the real estate which they claimed to have inherited. The defendants were in possession. It is perfectly clear from the opinion, that had there been no question of the statute of limitations, and had the statute of 1862 of California been in force at the time of the probating of the will, which authorized the District Courts of California to entertain proceedings to set aside wills and their probate on the ground of fraud, the jurisdiction of the Circuit Court of the United States would have been sustained. That such is the case clearly appears from the following language of the opinion:

"The statute of 1862 has been referred to, which gives to the District Courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment or perjury. Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States so long as the equitable rights themselves remain, *yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the state. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding.* Indeed, much of *equitable jurisdiction* consists of better and more effective *remedies* for attaining the rights of parties. But the statute referred to cannot affect this suit, inasmuch as the statute of limitations would still apply in full force, and would present a perfect bar to the suit."

Gaines v. Fuentes, 92 U. S. 10.

This court having before it the question whether a Circuit Court of the United States sitting in equity in the State of Louisiana had jurisdiction to entertain a suit to annul a forged will and its fraudulent probate, said:

"The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. *It is in all essential particulars a suit for equitable relief*—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. *There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity, but they are none the less essentially such suits, and if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a Federal Court, where the parties are on the one side citizens of Louisiana and on the other citizens of other states.*"

Ellis v. Davis, 109 U. S. 485, 496.

"Where provision is made by the laws of a state, as is the case in many, for trying the question of the validity of a will already admitted to probate by a litigation between parties in which that is the sole question, with the effect, if the judgment shall be in the negative, of rendering the probate void for all purposes as between the parties and those in privity with them, it may be that the courts of the United States have jurisdiction under existing provisions of law, to administer the remedy and to establish the right in a case where the controversy is wholly between citizens of different states. The judicial power of the United States extends, by the terms of the Constitution, 'to controversies between citizens of different states,' and on the supposition, which is not admitted, that this embraces only such as arise in cases 'in law and equity,' it does not necessarily exclude those which may involve the exercise of jurisdiction in reference to the proof of validity of wills."

Byers v. McAuley, 149 U. S. 608.

A suit was instituted by persons claiming to be the heirs at law and next of kin of a decedent, against the

administrator of the estate with the will annexed. It was claimed by the complainants that one Mary McAuley left an instrument in writing in the following words:

"By request of my dear brother, my house on Duquesne Way is to be sold at my death and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women."

This instrument had been admitted to probate as the will of Mary McAuley, and letters of administration with the will annexed had been issued to one Byers. Byers proceeded with the administration of the estate until it was ready for distribution. The day before the hearing of the application for distribution, a bill was filed in the Circuit Court of the United States for the Western District of Pennsylvania, by citizens of states other than Pennsylvania. The bill set forth the death of Mary McAuley, that there were two classes of claimants to the estate, first and second cousins, that the so-called will was null and void, and that there was a large amount of personal estate in the hands of the administrator. The prayer was that the will and the probate be declared void and of no effect, that the administrator be enjoined from collecting the rents, that he be ordered to make an account of the assets, and that the assets be distributed among the complainants and all parties legally entitled thereto. The administrator filed a plea setting up the proceedings in the Orphans' Court. The plea was overruled. The Circuit Court entered a decree in accordance with the prayer of the bill. This court reversed so much of the decree of the Circuit Court as undertook to determine the rights of parties, as between themselves, who were citizens of the same state,

but affirmed so much of the decree of the Circuit Court as adjudicated the rights of persons possessing the requisite diversity of citizenship. The court held that complainants had no interest in the real estate mentioned in the instrument which had been probated as the will of Mary McAuley. This holding, however, was based upon the ground that the instrument, though void as a will, was valid as a declaration of trust.

If the decision of the Court of Appeals in the case at bar is correct, then this court, in the case of Byers v. McAuley, would have ordered that cause remanded and dismissed. It would not have affirmed so much of the decree of the Circuit Court as adjudicated the rights of parties before the court who possessed the requisite diversity of citizenship.

Corley v. Northern Pacific Railroad Company, 159 U. S. 569, 582.

A judgment had been entered upon a stipulation made by the attorneys of appellant. Thereafter, without taking any proceeding in the original suit, appellant instituted an original proceeding in the District Court of the Territory of Washington, to set aside the judgment in the former case, on the ground of fraud. The proceeding begun in the territorial court, was afterwards proceeded with in the Superior Court of the State of Washington for Spokane County, and then removed to the Circuit Court of the United States, which entered a decree dismissing it. The Circuit Court held that appellant should have applied to the state court by petition or motion in the original case, and should not have brought an independent suit; that

after the case had been removed from the state court to the Circuit Court of the United States it was treated as a suit in equity, and that a court of the United States sitting in equity could not afford appellant any relief. This court, in reversing the decree of the Circuit Court, said:

"Although the *statute of a state* or territory may not restrict or limit the equitable jurisdiction of the Federal Courts, and may not directly enlarge such jurisdiction, *it may establish new rights or privileges* which the *Federal Courts may enforce on their equity* or admiralty side, precisely as they may enforce a new right of action given by statute on their common law side." (Citing Broderick's Will, 21 Wall. 503.)

Bardon v. Land & River Improvement Company, 157 U. S. 327.

"We remarked in Gormley v. Clark, 134 U. S. 338, 348, that while the rule was well settled that remedies in the courts of the United States at common law or in equity, according to the essential character of the case, are uncontrolled in that particular by the practice of the state courts, yet an enlargement of equitable rights by state statutes may be administered by the Circuit Courts of the United States as well as by the courts of the state, *and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction.* Kieley v. McGlynn, 21 Wall. 503, 520." (Broderick's Case.)

Smythe v. Ames, 169 U. S. 466, 517.

"A party, by going into a National Court, does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; the wise policy of the Constitution gives him a choice of tribunals."

Darragh v. Wetter Mfg. Co., 78 Fed. 7, 14.

"Rights created or provided by the statutes of the states to be pursued in the state courts, may be enforced and administered in the Federal Courts, either at law, in equity or in admiralty, as the nature of the new rights may require."

Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579.

"It may well be affirmed that a state, by prescribing an action at law to enforce even statutory rights, cannot oust a Federal Court sitting in equity of its jurisdiction to enforce such rights, provided they are of an equitable nature."

Leighton v. Young, 52 Fed. 439, 442.

"Where a state statute creates a right and prescribes a mode of proceeding to enforce it in the state courts, the courts of the United States in that state will enforce the right, but not always in the mode prescribed for enforcing it in the state courts."

We now ask the attention of the Court to a review of the principal cases relied on by counsel for Marie Carrau upon the proposition that the Circuit Court had no jurisdiction of this suit.

Bedford Quarries Co. vs. Tomlinson, 95 Fed. 208.

The Court said:

"The bill, no doubt, states a good cause of action at law against the decedent, and this is all. No reason is given why equity should take cognizance of the case. For aught that appears, the complainants have an adequate remedy at law for the collection of their debt. There are no allegations tending to show fraud or concealment on the part of the executors, or misappropriation of property, making a bill for discovery necessary."

In the suit at bar no action at law could be maintained by complainants. No action can be maintained in ejectment against an administrator in the State of Washington. It is plain, therefore, that the case has no application to this suit.

Walker v. Brown, 63 Fed. 204.

This case simply holds that a purely legal demand cannot be enforced in equity because it is against a dead man's estate. It recognizes and approves of the rule laid down in Byers v. McAuley, 149 U. S. 608.

Wahl v. Franz, 100 Fed. 680,

is a case which reviews almost all the authorities on the subject of the jurisdiction of a Circuit Court of the United States to entertain a suit for the annulment of a will. The decision of the majority of the Court holds that under the statutes of Arkansas, where the case arose, no Court other than the Probate Court had jurisdiction to entertain a contest of a will; that the right of appeal to the Circuit Court was supervisory, and that the proceeding on appeal could not, therefore, be removed from the State Court to the Circuit Court of the United States. The dissenting opinion of Judge Sanborn is certainly a very strong argument against the conclusion which the majority reached. The decision of the majority was finally based upon the proposition that the *State Circuit Court* of Arkansas had no *original jurisdiction* to entertain a contest of the will; and that the *appeal* from the Probate Court to the Circuit Court was but a continuation of the proceedings in the Probate Court, and therefore the Circuit Court of the United States could not acquire jurisdiction of that appeal

by a removal. It is not an authority in the case at bar, for the reason that the Superior Court of Washington is the only State Court in the state having original jurisdiction. The opinion of Judge Sanborn reviews the authority cited against the jurisdiction of the Circuit Court to entertain a suit in equity for the annulment of a will, and he concludes as follows:

"Where the statutes of a State create the right to institute in its Courts of general jurisdiction, either by appeal or by original process, and to maintain and try according to the course and practice of the common law or according to the practice in equity, a suit between opposing parties to avoid a will and the probate thereof for fraud, undue influence, or illegality in its making, the Federal Court in that state has original jurisdiction of a like suit between citizens of different states involving the necessary amount."

The case of

In re Cilley, 58 Fed. 977,

was a case where it was sought to remove *a probate appeal* to the Circuit Court of the United States on the ground of local prejudice. The court held that a proceeding to establish a will in the Probate Court where the local courts had no jurisdiction of such matter, could not be removed to the Federal Court. The Court distinguished the case from Byers v. McAuley. It will be observed that the proceeding sought to be removed was an appeal from a Probate Court, and not a proceeding instituted in a State Court of general jurisdiction.

Ellis v. Davis, 109 U. S. 485,

is a decision which is clearly favorable to the exercise of jurisdiction in the present case, as the quotation therefrom above cited shows.

Simmons v. Saul, 138 U. S. 439,

does not touch the question in the present suit. The question there presented is as to whether the judgment of a Court of competent jurisdiction could be collaterally attacked by a suit in the Circuit Court of the United States. The Court held that the parish court had exclusive jurisdiction over the administration of vacant and intestate successions. The conclusion was reached that the Court whose judgment was sought to be attacked had jurisdiction, and that its decree was binding.

Broderick's Will, 21 Wall. 203.

This case does not conflict with the cases holding that where a proceeding to contest a will can be maintained in a court of general jurisdiction, such a proceeding can be maintained in a Circuit Court of the United States by a suit in equity where the requisite diversity of citizenship and the requisite amount exists, and there is no adequate remedy at law. On the contrary, it is perfectly clear, from the opinion, that the views expressed on the question of jurisdiction would have been different had the act of 1862, authorizing the *District Court* to entertain a suit to set aside a will, been in force at the time the probate proceedings were had.

The case is commented upon in the case of

Gaines v. Fuentes, 92 U. S. 10, 21,

where, after sustaining the jurisdiction of the Circuit Court, Mr. Justice Field, in delivering the opinion, said, at page 20:

"Nor is there anything in the decisions of this Court in the case of Gaines v. New Orleans, reported in the 6th of Wallace, or the case of Broderick's Will, reported in the 21st of Wallace, which militates against these views. In Gaines v. New Orleans, this Court only held that the probate could not be collaterally attacked; and that, until revoked, it was conclusive of the existence of the will and its contents. There is no intimation given that a direct action to annul the will and restrain a decree admitting it to probate might not be maintained in a Federal as well as in a State Court, if jurisdiction of the parties was once rightfully obtained. * * *

"There are, it is true, in several decisions of this Court, expressions of opinion that the Federal Courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the State where the will is offered, or of other States. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the federal courts have concurrent jurisdiction with the State Courts under the Judiciary Act; *but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.*"

The case of

Reed v. Reed, 31 Fed. 49,

is one where the Court held that the institution of the proceedings in the court of common pleas was in the nature of an appeal. At page 51, the Court said:

"The case sought to be removed seems to be proceedings under a special statute of the state of Ohio, and classed with special remedies under the statute, in which the whole proceedings are directed by the statute, and substantially make the common pleas court an *Appellate Court, or an assistant to the Probate Court* on the probate of wills and settlement of estates. The Probate Courts of the counties have the exclusive jurisdiction for the probate of wills."

It also appears from the case that when proceedings were filed in the common pleas, the Probate Court was required to transmit to the common pleas the will, the testimony, and all papers relating thereto, and a copy of the final judgment was to be certified from the common pleas to the Probate Court. It is plain, therefore, that the proceeding in the common pleas court was in the nature of an appeal from the Probate Court, and was not an original proceeding in the common pleas court.

In re Aspinwall's Estate, 83 Fed. 852,

is a case where it was sought to remove an appeal taken to the Orphans' Court from the decision of the Registrar of Wills. The Court, holding that it had no jurisdiction on removal, said:

"Nor is this conclusion at variance with the rulings in Gaines v. Fuentes, 92 U. S. 18, and Ellis v. Davis, 109 U. S. 485, that, where by the law of a State suit may be maintained in a State Court to annul the probate of a will, such a suit may be maintained in a Federal Court,

where the parties on the one side and the other are citizens of different states. The proceeding upon this appeal is not such an annuling suit, nor is it analogous to such a suit. It is a part of the probate proceedings for the establishment of the contested instrument."

Oakley v. Taylor, 64 Fed. 245,

is based upon the proposition that the Circuit Court of the United States for the Eastern District of Missouri had *no original jurisdiction to set aside an instrument admitted to probate* by the Probate Court as the will of one Spear. The decision is based upon the proposition *that the jurisdiction exercised by the State Circuit Court* was *not original jurisdiction*, but was in the nature of *appellate, derivative* or *superintending jurisdiction over the Probate Court.*

The case of

Blythe v. Hinckley, 84 Fed. 228,

is one where it was sought to quiet the title of complainants to certain real property in California. The defendants claimed under one Florence Blythe Hinckley. The plaintiffs claimed that Florence was an alien, incapable of inheriting, and that the Superior Court of San Francisco was without jurisdiction to adjudge that she was capable of inheriting as an heir at law of Thomas H. Blythe. The decree of the Superior Court in favor of Florence had been affirmed. The property had been turned over to Florence Blythe Hinckley, and the Court held that there was a plain and adequate remedy at law. There is nothing in the case in support of the proposition that the Circuit Court had not jurisdiction to determine the

heirship of the complainants, and that the pretended nuncupative will under which Marie Carrau claims is ineffectual for any purpose.

Counsel for Marie Carrau admit that where a State statute allows a State Court of general jurisdiction to exercise jurisdiction to annul a will, that a Circuit Court of the United States can exercise like jurisdiction, but they ask the question whether any statute of Washington can be pointed to, giving the courts of equity jurisdiction of probate matters. It is not necessary that such jurisdiction should be given to the state court by statute. It is sufficient that such jurisdiction is customarily exercised. In Washington it is given by the Constitution.

In

Broderick's Case, *supra*,

this court, speaking of the right of action provided by the act of 1862 of California, for the annulment of a will, said:

"This is probably a case in which an enlargement of *equitable rights is effected, although presented in the form of a remedial proceeding.* Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

By reference to the Act of 1862, referred to by the court in its opinion in this case, it will be found that the State of California had provided as follows:

"The District Court shall have full power in all cases to set aside a will obtained by fraud or undue influence,

and to declare null and void any paper purporting to be a last will and testament, upon the ground of fraud or forgery, and to set aside a decree of any probate court admitting to probate any supposed will, when such decree has been obtained by fraud, concealment or perjury, and to establish a will lost or destroyed."

Hittell's Laws of California, Sec. 2605.
Gaines v. Fuentes, supra.

Suits to annul and cancel wills on the ground of fraud are not in Louisiana designated *suits in equity*, but this court in that case said:

"*But they are none the less essentially such suits.*"

The statute of Washington providing for the contest of a will is as follows:

"If any person interested in any will shall appear within one year after the probate or rejection thereof, and by petition to the superior court having jurisdiction contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issues shall be made up, tried and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will."

Pierce's Washington Code, Sec. 2395 (Ball. Code, Sec. 6110).

"Upon the filing of the petition referred to in the next preceeding section a citation shall be issued to the executors who have taken upon them the execution of the will,

or to the administrators with the will annexed, and to all legatees named in the will residing in the territory (state), or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on a day therein specified, to show cause why the petition should not be granted."

Pierce's Washington Code, Sec. 2396 (Ball. Code, Sec. 6111).

These sections of the statute create an equitable right in the form of a remedial proceeding. The Supreme Court of Washington has so decided.

"*Proceedings to contest a will are in their nature equitable, and trial by jury of issues of fact therein is not a matter of right.*"

Clayson v. Clayson, 26 Wash. 253.

In the State of Washington there are no Probate Courts. The Superior Courts of the state are courts of general jurisdiction. They are vested with all original jurisdiction not exclusively vested in some other court. Section 6, Article IV, of the State Constitution is as follows:

"The Superior Court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property * * * of all matters of probate * * * the Superior Court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."

Section 10, Article XXVII of the State Constitution is as follows:

"When the State is admitted into the Union, and the Superior Courts in the respective counties organized, the books, records, papers and proceedings of the Probate Court in each county, and all causes and matters of administration pending therein shall, upon the expiration of the terms of office of the Probate Judges on the second Monday in January, 1891, pass into the jurisdiction and the possession of the Superior Court of the same county created by this constitution, and the said court shall proceed to final judgment or decree, order or other determination in the several matters and causes as the territorial Probate Court might have done if this constitution had not been adopted. And until the expiration of the term of office of the Probate Judges, such Probate Judges shall perform the duties now imposed upon them by the laws of the territory. The Superior Courts shall have appellate and revisory jurisdiction over the decisions of the Probate Courts as now provided by law, until such latter courts expire by limitation."

"The constitution does not make the Superior Courts Probate Courts. On the contrary, it vests the Superior Courts with jurisdiction 'of all matters of probate,' hence the court is not shorn of its general powers simply because the case before it may be one *which was cognizable formerly in a court of probate.* It possesses in every case and at all times its powers as a court of superior and general jurisdiction, and among these is the power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. *The statute, therefore, can neither add to nor take away the power, and it is immaterial to inquire whether or not one conferring such power is in existence.*"

Reformed Presbyterian Church v. McMillan, 31 Wash. 643.

"When the constitution was adopted, the Superior Court was vested with general jurisdiction, such as was exercised by the territorial district courts, and also with jurisdiction in probate matters, and the Probate Court, as an independent tribunal, was abolished."

Ball et al. v. Clothier et al., 34 Wash. 299.

"In this state we have no Probate Court, properly speaking, as distinguished from the courts that entertain jurisdiction of other matters. * * * Matters pertaining to probate are referred to what is called 'Probate procedure,' as distinguished from what is denominated 'Civil' or 'Criminal' procedure, but when the court sitting in a probate proceeding discovers in a petition a statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder, when an appearance has been made thereto, and then proceed to try it in a proper manner *as any other civil cause.*"

Filley v. Murphy, 30 Wash. 1, 5.

"It is not a law court, nor an equity court, nor a Probate Court, but it is all the time the Superior Court of general jurisdiction, empowered to try *all these differently termed causes under the title of a civil action*, and when it has once acquired jurisdiction *of that civil action*, it may proceed, in an orderly way, to determine equitable, legal or probate controversies."

Browder v. Phinney, 30 Wash. 74.

In

State ex rel. Stratton v. Tallman, 25 Wash. 295,

the Supreme Court of the state, speaking of the same alleged will which is involved in this suit when the Attorney General of the state sought to attack its probate by motion, said:

"There is a plain procedure which is speedy and adequate, pointed out in Sec. 6110 Ball. Code, by which issues may be properly made up and tried and determined, respecting all questions affecting the regularity of the execution or of the validity of the will, *and the Superior Court entertaining such a suit* may fully protect such rights in the estate by such *stay of proceedings in the procedure in probate* as may be necessary or effective."

In

Higgins v. Nethery, 30 Wash. 239,

the language of this court is:

"This *action* was begun by the appellants on February 15, 1901, to set aside the will upon the grounds that the deceased did not make it, that the same is void because the testator at the time the will was made was not of sound mind. * * * *On the trial the court found the facts against the contestants*, and dismissed the *action*. * * * When the cause was called for trial, appellants (*plaintiffs below*) requested the court to impose the burden of proof upon the *defendant*. * * * When the record shows, as it does in this case, that the court had jurisdiction, and all the facts appear to show *prima facie* a valid will, the order of the court admitting the will to probate must have some force. For that reason the burden must be upon the *plaintiffs* to show that the will was invalid by reason of the facts alleged, namely, that the testator did not execute the will, or that he was not of sound mind, or was under undue influence at the time he made it. The order admitting the will to probate is not *conclusive* of the facts necessary to support it, but when the facts appear of record they must be taken as true until the contrary is shown."

These decisions of the Supreme Court of the State of Washington demonstrate that the proceeding to contest a will and its probate is a suit in a court of general jurisdiction.

In the opinion of the Court of Appeals in this suit, the court said that the Supreme Court of the State, in denominating the proceeding to contest a will, provided by the state statute, a "*suit*," manifestly used an inapt expression (838).

In

Weston v. City Council of Charleston, 2 Pet. 449,

this court, speaking by Chief Justice Marshall, in defining the word "suit," said:

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. *The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.*"

In

Traction Co. v. Mining Co., 196 U. S. 239,

this court said, at page 250:

"In the more recent case of Smith v. Adams, 130 U. S. 167, 173, Mr. Justice Field, speaking for the court and referring to the clauses of the Constitution and the statutes relating to the judicial power and the courts of the United States, said: 'By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy.'"

At page 255, speaking of the jurisdiction of the Circuit Court, the court said:

"In the exercise of that power a Circuit Court of the United States, sitting within the limits of a state and hav-

ing jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the state courts must take care, not to infringe any right secured by the Constitution and the laws of the United States."

At page 256, the court said:

"Was the case, as it was in the County Court, a suit in which there was a controversy between corporations of different States? If so, the right of removal was perfect under the act of 1887, 1888."

It is respectfully submitted that it would be hard to provide a proceeding which would have more of the characteristics of a suit than the proceeding provided by the statute of Washington, and in determining that it was a "suit" the Supreme Court of the state not only followed the rule announced by this court, but as the highest authority in the state, announced a rule for the courts of the state in construing a statute of the state. The Supreme Court of the state, in designating the proceeding a "suit," was not deciding that it was a "suit" over which the National Courts would have jurisdiction. It was only deciding in construing the state statute that the proceding was a "suit" to be entertained by the Superior Courts of the state in the exercise of their general jurisdiction. That determination is conclusive. As, then, this suit could be maintained in the courts of the state, it can be maintained in the Circuit Court of the United States sitting in the same state, the other jurisdictional requirements existing.

In

Woerner on Administration (2nd Ed.), Sec. 156, p. 357,

the law is thus stated:

"While the probate of a will *ex parte* is *in rem*, and, not being between parties, cannot be removed to the Federal Courts, yet where such will is contested in pursuance of statutory provisions, and becomes a suit *inter partes*, residing in different states, the Federal Courts take jurisdiction as they would in any other controversy between the parties."

Brodhead v. Shoemaker, 44 Fed. 518.
Everhart v. Everhart, 34 Fed. 82.
Kirby v. R. R. Co., 106 Fed. 551.
McDonald v. Jordan, 178 U. S. 229.

If, in Richardson v. Green, the Circuit Court of the United States for the District of Oregon had jurisdiction in equity of a suit to annul a will and its probate, although the only court of the state in which a contest might be instituted had no jurisdiction in equity and none at law where the amount involved exceeded five hundred dollars, then the jurisdiction of the Circuit Court in that case was founded upon the proposition that an equitable right had been created by a state custom, and a court of the United States could enforce that right in equity, regardless of the remedy existing in the courts of the state, and regardless of the character of the court of the state in which it might be enforced, provided the right to be enforced was one which was to be enforced *inter partes*.

Ex parte McNeil, 13 Wall. 236, 243.

"A state law cannot give jurisdiction to any Federal Court, but that is not a question in this case. A state law

may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not *confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy.* This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal."

If the customary exercise of jurisdiction by a county court in Oregon in the exercise of probate jurisdiction over a proceeding *inter partes* to annul a will and its probate, was sufficient to authorize the Circuit Court of the United States in Oregon, sitting in equity, to take jurisdiction of a suit to annul a will and its probate, how can it be claimed that the customary constitutional and statutory exercise of jurisdiction by the Superior Courts of the State of Washington over like proceedings, can deprive the Circuit Courts of the United States sitting in Washington of jurisdiction to entertain a similar suit?

If the statute of Washington and the decisions of the Supreme Court of the state do not make it clear that the contest of a will and its probate is a proceeding *inter partes*, and is a suit of such a character as authorizes a Circuit Court of the United States to take jurisdiction when instituted by parties possessing the requisite diversity of citizenship, and where the amount involved is sufficient, the decision in

Richardson v. Green, 61 Fed. 423,

would not have been approved by this court.

Richardson v. Green, 159 U. S. 264.

We submit that it is not competent for the State of Washington to provide a remedy by which a will, after its probate, can be attacked by a proceeding *inter partes* in a court of general jurisdiction, that the procedure should be of an *equitable nature,* that it should be a *suit, a civil action,* but that a party claiming such remedy must resort exclusively to courts of the state or give up his right to redress, although, by reason of his citizenship,—

"The wise policy of the Constitution gives him a choice of tribunals."

We submit that no case can be found denying the jurisdiction of a Circuit Court of the United States over a suit to annul a will and its probate, instituted by parties possessing the requisite diversity of citizenship, where the amount involved is sufficient for jurisdictional purposes, when by the law of the state where the Circuit Court of the United States is held, a proceeding *inter partes*, other than by an appeal, can be maintained in a State Court of general jurisdiction to obtain the same relief.

B.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON, UNDER THE ALLEGATIONS OF THE BILL, HAD JURISDICTION IN EQUITY TO ENTERTAIN THE SUIT TO SET ASIDE THE WILL ON THE GROUND OF FRAUD, AND TO ENJOIN MARIE CARRAU FROM ENJOYING THE INEQUITABLE ADVANTAGE OB-

TAINED BY THE DECREE PROBATING THE SAME, BECAUSE PROCURED BY FRAUD, AND WHICH, IF ALLOWED TO STAND, WOULD CONSTITUTE MUNIMENTS OF TITLE.

In

Cowley v. Northern Pacific R. R. Co., 159 U. S. 569, 580,

this court distinguished the cases of

Gaines v. Fuentes, 92 U. S. 10,

and

Barrow v. Hunton, 99 U. S. 80,

and said:

"The distinction between the two cases above cited is that in the latter case the judgment was impeached for a matter of form, and in the former case for the *falsity and insufficiency of the testimony* upon which the will was admitted to probate; in other words, *for a fraud connected with the probating of the will.*"

In

Marshall v. Holmes, 141 U. S. 590,

this court cited Gaines v. Fuentes, Barrow v. Hunton, Johnson v. Waters, *supra*, and Arrowsmith v. Gleason, 129 U. S. 86, and said:

"These authorities would seem *to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit because it relates to judgments obtained in the court of another jurisdiction.* While it cannot require the state court itself to set aside or vacate the judg-

ments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in the state court. It would simply take from him the benefit of judgments obtained by fraud."

That a court of the United States has jurisdiction of a suit to enjoin a person from availing himself of a judgment obtained by fraud, based upon false evidence and rendered *ex parte* is clear.

Howard v. Cordora, 177 U. S. 609.
Graver v. Faurot, 76 Fed. 257.
Arrowsmith v. Gleason, 129 U. S. 86.
Marshall v. Holmes, 141 U. S. 590.
Cooper v. Newell, 173 U. S. 155.
Huntington v. Laidley, 176 U. S. 668.
National Surety Co. v. State Bank, 120 Fed. 593.
McNeil v. McNeil, 78 Fed. 834.
Davenport v. Moore, 74 Fed. 945.
Johnson v. Waters, 111 U. S. 640.

C.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON HAD JURISDICTION OF THE SUIT BETWEEN PARTIES TO THE RECORD, TO CONSTRUE THE ALLEGED NUNCUPATIVE WILL AND DETERMINE IT INVALID

ON ITS FACE, ON THE GROUND THAT THE SECTION OF THE ACT OF THE TERRITORY OF WASHINGTON UNDER WHICH ITS VALIDITY IS ASSERTED, IS VOID, BECAUSE IN CONFLICT WITH SECTION 6 OF THE ORGANIC ACT OF THE TERRITORY ENTITLED "AN ACT TO ESTABLISH THE TERRITORIAL GOVERNMENT OF WASHINGTON."

By Section 6, Article IV of the Constitution of Washington, above cited, it was provided:

"The Superior Court shall have original jurisdiction in all cases in equity and in all cases at law, which involve the title or possession of real property."

Under the law of Washington, approved March 20th, 1895 (Laws of Wash., p. 197 *supra*), the real estate of John Sullivan vested immediately on his death in the complainants. Under the general law his personal property, upon the qualification of an administrator of his estate, vested in the administrator in trust for complainants, unless it passed under the alleged nuncupative will and the alleged decree of probate to Marie Carran. The bill specifically alleged that under the law of the State of Washington a nuncupative will, where the estate bequeathed exceeded the value of two hundred dollars, was invalid, and that even if valid, it could not convey real estate (8, 9).

The bill set out the alleged nuncupative will, purporting on its face to dispose of "property and personal effects worth many thousands of dollars," and alleged that the

real estate in Seattle of which the deceased died siezed exceeded the value of three hundred thousand dollars (7).

The bill also set out the petition of the defendant Carrau for the probate of the alleged will, in which she stated that:

"The testamentary words were thereafter reduced to writing, which writing accompanies this petition. * * * That the decedent was a bachelor, and left no widow, heirs or next of kin, so far as known to your petitioner, and that the decedent left personal property of the value of fifty thousand dollars, and real estate in said County of King of the probable value of four hundred thousand dollars.

Wherefore, petitioner prays that said will be admitted to probate" (7).

The defendant claimed that the entire estate passed to her under the alleged will.

The bill specifically prayed as follows:

"That the said pretended nuncupative will * * * be adjudged null and void and of no force and effect whatsoever, *and in the event that said will should not be adjudged null and void, the same should be adjudged not to pass title to any real estate of the estate of John Sullivan, deceased, nor any of the rents, issues and profits issuing out of said real estate since the death of said John Sullivan, deceased*" (10).

The bill, therefore, stated facts clearly showing, that even assuming that the decree of probate rendered without jurisdiction and procured by fraud, conclusively established the execution of the alleged nuncupative will, still the title to the personalty was held by the administrator

in trust for complainants, and the title to the realty passed upon his death to complainants, for the following reasons:

1st. Because the alleged will was invalid, in that it bequeathed an estate exceeding in value two hundred dollars.

2nd. Because even if valid, it could not convey real estate, and as to the real estate the deceased died intestate.

The facts alleged in the bill, therefore, invoked the jurisdiction of the Circuit Court of the United States for the District of Washington to construe the alleged will, and determine:

1st. Its validity.

2nd. If valid, whether or not real estate was conveyed by it.

There has never been any doubt that the matter of the construction of wills is one over which courts of equity and courts of law have jurisdiction. There has never been any doubt that the construction of wills is not a matter of probate jurisdiction, although a probate court may by statute be vested with jurisdiction to construe wills. The power to construe wills was, therefore, a matter of which the Circuit Courts of the United States were by the Constitution and laws of the United States vested with jurisdiction. A state statute expressly providing that the probate court should have the sole and exclusive jurisdiction to construe wills could not deprive the Circuit Courts of the United States of the jurisdiction to construe wills

vested in them by the Constitution and laws of the United States.

If the legislature of the Territory of Washington had undertaken to enact a law which conferred upon the probate courts of the territory, jurisdiction in equity and at law, to construe wills, in order to determine the title to real estate, such act would have been in conflict with the Act of Congress, because it would have clothed the probate court with other than probate powers, and would have vested in that court jurisdiction in matters of chancery and at common law, which the Act of Congress provided should be vested in the Supreme and District Courts of the territory.

Revised Statutes U. S., Sections 1866-1868.
Ferris v. Higley, 20 Wall. 375.
Chadwick v. Chadwick, 6 Montana, 566.
Locknane v. Martin, McCahon, 60.
Dewey v. Dyer, McCahon, 77.
Maybur, Graham et al. v. Kelly, 1 Kan. 116.
The People v. Durell, 1 Idaho 30.
Moore v. Koubly, 1 Idaho 55.

It is not unreasonable to assume, therefore, that the framers of the Constitution of Washington, when they vested the Superior Court of the state with—

"original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property * * * (and) of all matters of probate,"

used those terms as they had been defined by this court and by the Supreme Courts of the different territories, and

thereby vested the Superior Court with power in the exercise of its jurisdiction in equity and at law, to construe wills and to determine the title to and possession of real property thereunder.

The power to construe wills is not included within the grant of jurisdiction "of all matters of probate," except as such power is incidental to the exercise of probate jurisdiction.

The question whether title to property passes under a will to a legatee or devisee, or by reason of the invalidity of the will passes to the heir at law or next of kin of the decedent, does not call for the exercise of jurisdiction in matters of probate, but requires the exercise of jurisdiction in chancery or at law.

"The power to determine directly and conclusively the construction to be given to wills is not committed to the court of probate, nor to the Superior Court sitting as an appellate court of probate. Such a power involves the right to try and finally determine disputed titles to property, real and personal, and this is not given to those courts."

In re Chapman's Est., 70 Conn. 363.

"If the will be properly executed and proved, it must be admitted to probate, although it contain not a single provision capable of execution or valid under the law, hence the probate does not establish the validity of any of its provisions. This is to be determined by the courts of construction when any question arises requiring their interposition."

1 *Woerner on Administration*, Sec. 228, p. 502.

"The admission of a will to probate, either in common

or solemn form, does not preclude inquiry into the validity of one or more of the provisions therein contained, or of their proper construction or legal effect. It simply establishes the fact that a will has been made according to the form prescribed by the statute."

Burkett v. Whittemore, 36 S. C. 428.

"The probate court has the power, upon proper proceedings, to make a decree of distribution, * * * but it has no power in this state to construe a will,—to determine its effect upon the distribution of the estate,—or to adjudicate between the heirs and the residuary legatees. Such power is given to probate courts in some states, but in our system it is reserved to the law and equity courts. * * * In this case there is a question whether the school district can take under the will, and whether, if they can take, they have not by their action rejected the legacy. This is a question between the school district and the heirs, which can be determined only by the court of equity or law jurisdiction, upon proper pleadings, notice and hearing. Not even the Supreme Court of Probate upon appeal can exercise the equity powers conferred upon the Supreme Judicial Court."

Hanscom v. Marston, 82 Me. 288.

"The legal effect of the will or its various provisions, its construction and operation, do not come in question, and cannot be passed upon on an application to admit the will to probate. *The probate court does not assume to determine the validity of a will*, but only that the instrument presented for probate was executed as his last will and testament by the testator in the manner prescribed by statute, and that he was legally competent to make a will."

Graham v. Birch, 47 Minn. 171.

"In the second petition the question presented to the Probate Court was whether or not the property therein specified was, for the purpose of its distribution under the will, real estate or personal property, as under the terms

of the will it was to be distributed differently according to which of the above classes of property it belonged, but the determination of this question was also within the domain of equity jurisdiction. The inquiry whether or not this was to be deemed real estate or personal property for the purpose of distribution according to the provisions of the will, should be addressed to a court of chancery."

Chadwick v. Chadwick, 6 Montana, 566.

The next position of counsel for defendant is that the probate of the will is conclusive, and therefore the will itself must be regarded as valid until it or the probate thereof be set aside by proper proceedings. * * * The probate of the will under the statute in force at the time, had the effect to establish its execution and rendered it admissible as an instrument of evidence in the courts of the state, and nothing more. (Code 1851, Secs. 1297, 1300). It did not establish the testamentary character of the instrument and give validity to a title based upon it. The effect of the will and its interpretation, whereon titles under it rested, were not determined in the proceedings for its probate."

Fallon v. Chidester, 46 Iowa, 588.

"The court was asked, in effect, to determine the rights of the parties claiming under the will, and not merely to determine whether it was an instrument made and published under such circumstances and with such legal forms as to constitute it the last will and testament of the testator and entitle it to probate as such. * * * That was a question of construction of the contents of the will, and not of the sufficiency of its execution and publication. The latter being established, it was not for that court to say whether any title passed to the parties claiming under its provisions."

Lusk v. Lewis, 32 Miss. 297.

"The validity of the will under which the respondent claims title must be determined, according to the laws of Iowa, where the land is situated. * * * By the law of

Iowa, as interpreted by the Surpeme Court of the State, the will was revoked by the birth of an heir after it was executed. * * * The probate of the will in Iowa, while it settles the question of its due execution, does not conclusively establish its validity, or determine its force and effect when title to real estate is claimed under it. * * * It follows that as to the land in controversy there is no valid will, and the same is to be disposed of according to the Iowa law of descent."

Ware v. Wisner, 50 Fed. 310.

Boman v. Boman, 49 Fed. 329.

The statute of Washington is very similar to the statute of Iowa.

"Every will proved according to the provisions of this chapter, recorded and certified by the Judge of the Superior Court and attested by the seal of said Court, may be read as evidence without any further proof."

Pierce's Code, Sec. 2392. (Ball. Code, 6107.)

"The record of any will made, proved and recorded as aforesaid, and the exemplification of such record by the Clerk in whose custody the same may be, shall be received as evidence, and shall be as effectual in all cases as the original would be if produced and proven."

Pierce's Code, Sec. 2393. (Ball. Code, Sec. 6108.)

All that the statute dispensed with, if the will was legally probated, was the proof of the will. The decree of probate is not an adjudication of the validity of the will. The questions of the validity of the will and of the effect of the will are matters for the courts exercising jurisdiction in chancery and at law.

The construction of wills being a matter over which courts of equity and law both exercise jurisdiction, the power to construe wills was by the constitution of the state vested in the Superior Court by the grant of jurisdiction in equity and at law. It was not vested in the Superior Court by virtue of the grant of jurisdiction "in matters of probate." It is clear, therefore, that in determining the validity of the alleged will, and if valid whether real estate passed under it, the suit, if complainants had instituted one in the state court, would have been entertained by the state court under its jurisdiction in matters of law and equity, and not by the Superior Court in the exercise of jurisdiction over matters of probate.

The courts of the United States have repeatedly exercised their jurisdiction either on the law side or in equity, to construe wills and determine the rights of parties thereunder. If the construction of a will should be involved in an action of ejectment, then the court on its law side would construe the will and determine whether the title of the deceased passed to his heir by operation of law, or vested in the devisee claiming under the will. If the case presented to the court should be one in which there was no adequate remedy at law in the courts of the United States, then those courts would exercise jurisdiction in equity to construe the will.

Hardenbergh v. Ray, 151 U. S. 112.
Potter v. Couch, 141 U. S. 296.
Colton v. Colton, 127 U. S. 300.
Jones v. Habersham, 107 U. S. 174.
McDuffie v. Montgomery, 128 Fed. 105.

Sherman v. American Cong. Ass'n, 113 Fed. 609.
Waterfield v. Rice, 111 Fed. 625.
Handley v. Palmer, 103 Fed. 39.

Possession of the entire estate was in the defendant O'Brien as administrator and as trustee either for the defendant Marie Carrau under the alleged will if it was valid, and if it conveyed real estate and was probated, or, if it was invalid, or if it did not convey real estate, or if it had not been legally probated, in trust for these complainants as heirs at law and next of kin of the deceased. The entire estate was claimed, on the one hand, by these complainants as such heirs at law and next of kin of the deceased, and on the other by the defendant Marie Carrau under the alleged will and the pretended decree of probate.

It is clear that as to the personal property a court of equity had jurisdiction of a suit by the next of kin against the administrator and the beneficiary under the alleged will to construe the alleged will and determine whether it was valid or not, and if invalid, to have it decreed that the personalty was held in trust by the administrator for such next of kin. It is clear that if the court obtained jurisdiction for the purpose of establishing the equitable right of the next of kin to the personal estate, it had jurisdiction to adjust the whole controversy, and to determine the title to the real estate and whether it vested in the claimant under the alleged will, or in the complainants as heirs at law of the deceased.

In

Wager v. Wager, 89 N. Y. 162,

the court said:

"The plaintiffs are next of kin and heirs at law of William Wager, deceased, and claim to be entitled to share in his residuary estate, which, as they allege, is undisposed of by his will. The defendant Eliza H. Wager is the widow and executrix of the testator, and has taken possession of all the property and estate which he had at the time of his death, and claims to own and hold the same in her own right, to the exclusion of the plaintiff and other heirs and next of kin, and claims that by said will the whole of said property and estate belongs to her as devisee and legatee, absolutely. * * *

The complaint was dismissed in the court below, on the sole ground, as stated in the conclusion of law of the trial judge, that the court had not jurisdiction to declare and adjudge the construction of the will of said William Wager, deceased, in this action.

This conclusion cannot, in our judgment, be sustained. * * * The jurisdiction of equity over trusts gives it authority to construe wills whenever necessary to control or guide the action of a trustee, and there can be no clearer case for the exercise of that jurisdiction than where the trustee denies the existence of the trust and claims the right to appropriate the trust property to his own use. An executor is always a trustee of the personal property of the testator, and can be called upon to account therefor as such in a court of equity, even though no express trust be created by the will. So far as the property is effectually disposed of by the will, the executor holds it in trust for the legatees or beneficiaries, and according to the law of this country, if there is any part of such property or any interest therein not effectually disposed of by the will, he holds it in trust for those who are entitled to it under the statute of distributions. Bowers v. Smith, 10 Paige, 193. 1 Wms. Exrs. 294, 2 Story Eq. Jur. Sec. 1208. Hayes v. Jackson, 6 Mass. 153.

Any person claiming an interest in the personal estate of the testator, either as legatee under the will or as entitled to it under the statute of distributions, may file a bill against the executors to settle the construction and ascertain the validity of the provisions of the will so far as the

complainant's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to. Bowers v. Smith, 10 Paige, 200.

As all trusts are the peculiar objects of equitable cognizance, courts of equity will compel the executor to perform his testamentary trusts with propriety. Hence, although in those courts as well as in courts of law, the seal of the court of probate is conclusive evidence of the *factum* of a will, an equitable jurisdiction has arisen of construing the will in order to enforce a proper performance of the trusts of the executor. The courts of equity are consequently sometimes called courts of construction, in contradistinction to the courts of probate. 1 Wms. Exrs. 294. Hayes v. Hayes, 48 N. H. 219. Redf. Wills, 495."

In

Read et al. v. Williams et al., 125 N. Y. 560, 560,

the court court said:

"The jurisdiction of a court of equity to entertain an action in behalf of the next of kin of a testator for the construction of a will disposing of personal estate, where the disposition made by the testator is claimed to be invalid or inoperative for any cause, was asserted by the chancellor, in Bowers v. Smith, 10 Paige, 200, and was maintained in Wager v. Wager, 89 N. Y. 161, and in Holland v. Alcock, 108 N. Y. 312 (16 N. E. Rep. 305). It is true that in such cases the next of kin claim in hostility to the will, but the executors, in case the disposition made by the testator is invalid or cannot take effect, hold the personalty upon a resulting trust for those entitled under the statute of distributions, and thereby the jurisdiction to bring an equitable action for construction and to have the resulting trust declared by the court, attaches as incident to the jurisdiction of equity over trusts."

If the defendant, Marie Carrau, had been in possession of the real estate, and complainants had instituted in the

Circuit Court of the United States a suit in ejectment, the jurisdiction of the Circuit Court of the United States as a court of law would have been beyond question, and in that suit the Circuit Court of the United States would have had presented to it and would have determined the validity of the will, and if valid, whether the title and right to possession of the real estate was in the complainants as heirs at law of the deceased, or whether it was in the defendant Carrau by reason of the will. The defendant Carrau, however, was not in possession of any of the property. An action of ejectment, therefore, could not be maintained against her, nor could a court of law accord complainants any relief.

The relief which complainants sought was injunctive relief, enjoining the defendant Carrau from getting possession of the estate from the trustee, who held it in trust for the complainants. The facts alleged in the bill made the suit one of equitable cognizance from every standpoint.

THE ONLY TEST OF WHETHER A CIRCUIT COURT OF THE UNITED STATES HAS JURISDICTION IN EQUITY, AS DISTINGUISHED FROM JURISDICTION AT LAW, DEPENDS ON WHETHER THE REMEDY AT LAW IS AS COMPLETE AND ADEQUATE AS THAT WHICH CAN BE AFFORDED BY A COURT OF EQUITY. IF IT IS NOT, THEN THE COURT HAS JURISDICTION IN EQUITY.

Rich v. Braxton, 158 U. S. 378.
Gormley v. Clark, 134 U. S. 338.
Allen v. Hanks, 136 U. S. 301-310.

Tyler v. Savage, 143 U. S. 79-95.
Kilbourne v. Sunderland, 130 U. S 505-514.
Boyce's Executors v. Grundy, 3 Peters, 210-215.
Walla Walla v. Walla Walla Water Company, 172 U. S. 1-12.
Bardon v. Land Co., 157 U. S. 330.
Smyth v. Ames, 169 U. S. 516.
Sheffield Furnace Co. v. Witherow, 149 U. S. 574-579.
Hudson v. Randolph, 66 Fed. 217.
Waite v. O'Neil, 72 Fed. 356.

In

McConihay v. Wright, 121 U. S. 201,

a suit was brought in the Circuit Court of the United States in equity to quiet the title of complainant to a tract of land in West Virginia. The West Virginia code allowed an action of ejectment to be maintained against one claiming title to or an interest in land, although not in possession. The jurisdiction of the Circuit Court of the United States, in equity, was objected to on the ground that the complainant had a plain and adequate remedy at law under the West Virginia statute. This court, considering the objection, said:

"Admitting this to be so, it nevertheless cannot have the effect to oust the jurisdiction in equity of courts of the United States as previously established."

THE CIRCUIT COURT OF THE UNITED STATES HAD JURISDICTION OF THE SUIT AS ONE TO QUIET THE TITLE OF COMPLAINANTS AGAINST

THE CLAIM OF THE DEFENDANT MARIE CARRAU UNDER THE ALLEGED WILL AND THE FRAUDULENT DECREE OF PROBATE.

Neither complainants nor the defendant Carrau were in possession. The administrator held the property as trustee for the true owners. A decree in favor of complainants, quieting their title as against the claim of the defendant Carrau, would enable complainants to petition the state court to direct the surrender of the property by the administrator to them without interference from the defendant Marie Carrau.

AS A SUIT TO QUIET THE TITLE OF COMPLAINANTS, THEREFORE, THE CIRCUIT COURT OF THE UNITED STATES HAD JURISDICTION IN EQUITY.

Where the statute of a state authorizes a suit to quiet title to be maintained by one not in possession of land against another claiming title to the land, who is also out of possession, a Circuit Court of the United States in equity has jurisdiction of a suit to quiet the title. The right given by the state statute will be enforced by the Circuit Court of the United States, and as the defendant is not in possession of the land, and therefore ejectment would not lie, the remedy is in equity.

Dick v. Foraker, 155 U. S. 404.
Roberts v. Northern Pacific Railroad, 158 U. S. 30.
Wehrman v. Conklin, 155 U. S. 324.
Missouri, K. T. & T. Co. v. Krumseig, 172 U. S. 351.
Holland v. Challen, 110 U. S. 19.

Whitehead v. Shattuck, 138 U. S. 146.
Frost v. Spitley, 121 U. S. 552.
Moore v. Steinbach, 127 U. S. 70.
Reynolds v. Crawfordsville Bank, 112 U. S. 405, 410.
Harding v. Guice, 80 Fed. 162.
Southern Pacific v. Stanley, 49 Fed. 263, 265.

The statute of the State of Washington authorizes a suit to quiet title to real estate to be maintained by one not in possession of real estate against another also out of possession, but who asserts title thereto, even though the title asserted be void.

Kinsman v. Spokane, 20 Wash. 119.
Rohrer v. Snyder, 29 Wash. 199, 203.
Jackson v. Tatebo, 3 Wash. 456, 462.
Bloomingdale v. Weil, 29 Wash. 611, 634.

A NUNCUPATIVE WILL, UNDER THE LAW OF WASHINGTON, IS INVALID WHERE THE ESTATE BEQUEATHED EXCEEDS TWO HUNDRED DOLLARS.

Section 6 of the Organic Act of the Territory of Washington, approved March 2, 1853 (U. S. Stats. at Large, Vol. 10 pp. 172, 175), is as follows:

"Section 6. * * * To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, *every law shall embrace but one object, and that shall be expressed in the title.*"

The Territorial Legislature, at its first session, in 1854, enacted a statute entitled:

"An Act establishing probate courts for the Territory of Washington."

Laws of 1854, Territory of Washington, p. 309.

At the same session, the legislature enacted a statute entitled:

"An Act relating to Wills."

Laws of 1854, p. 312.

Section 23 of this act provides:

"No nuncupative will shall be good when the estate bequeathed *exceeds the value of two hundred dollars, nor* unless the same be proven by two witnesses. * * *"

No change was attempted to be made in the amount of an estate which could be bequeathed by nuncupative will, until November 11, 1873, when the legislature of the Territory, by an act approved on that date, entitled:

"An Act *defining the jurisdiction and practice* in the probate courts of Washington Territory,"

omitted the word "nor" after the words "two hundred dollars" and before the word "unless," and thereby, if the repeal was valid, removed the limitation on the amount of an estate which might be bequeathed by nuncupative will.

Laws of 1873, pp. 252, 259, making the section read as follows:

"Section 33. No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred

dollars (————), unless the same be proved by two witnesses. * * *"

Section 33 of the Act of March 11, 1873, was re-enacted by the Territorial Legislature by an act approved December, 1, 1881, entitled:

"An Act *defining the jurisdiction and practice* in the probate courts of Washington Territory."

Pierce's Code of Washington, p. 355.

There is nothing in the title of the act of November 11, 1873, nor in the title of the act of December 1, 1881, relating in any manner to the subject of wills. The section in the body of each of those acts, re-enacting section 23 of the act of 1854, but omitting the word "nor," and by such omission, repealing the limitation imposed by section 23 of the act of 1854, upon the amount of an estate which might be bequeathed by nuncupative will, is in conflict with the provisions of section 6 of the Organic Act of the Territory of Washington, which required that every law of the Territory—

"—shall embrace but one object, and that shall be expressed in the title."

By leaving the word "nor," after the words "two hundred dollars" and before the word "unless," out of Section 33 of the act entitled: "An Act defining the jurisdiction and practice in the probate courts of Washington Territory," not only was the limitation upon the amount of an estate which might be bequeathed by nuncupative will, which had been imposed by Section 23 of the Act of 1854,

removed, but when the estate did not exceed two hundred dollars the formalities required by 29 Stat. of Charles II and by the Act of 1854 were entirely dispensed with. Could a legislator, hearing only the title of the act read, possibly contemplate that such a vital change in the law of wills was being made, in an act entitled: "An Act defining the jurisdiction and practice in the probate courts of Washington Territory?" Would he not necessarily conclude upon hearing the title read that the bill was one to amend the Act of 1854, entitled: "An Act establishing probate courts for the Territory of Washington," instead of "An Act relating to wills?" The vice in the act is that the title not only does not give notice that the legislature is dealing with the subject of wills, but it is actually misleading because it purports to deal only with the jurisdiction and practice of probate courts.

There has been no legislation relating to nuncupative wills since the Territory of Washington became a state.

That the title

"An Act *defining the jurisdiction and practice* in the probate courts of Washington Territory" is not sufficiently broad to cover a provision in the body of such Act repealing by implication the limitation of two hundred dollars which had been imposed upon the estates bequeathed by nuncupative wills, there is no doubt. There is in the title no indication that the legislature of the Territory was legislating upon the subject of wills. Legislation in reference to that subject was therefore void, because the title of the act did not conform to the requirements of the Organic Law of the Territory.

Armour v. Western Construction Co., 36 Wash. not yet officially reported.)

State v. Tieman, 32 Wash. 294.

State v. McDonald, 25 Wash. 122.

Sengfelder v. Hill, 21 Wash. 371.

In the case last cited, the court said:

"The title of the act is 'An Act to protect innocent purchasers of *community* real property,' which under section 19 of Article II of the state constitution *is too narrow to include within the terms of the act property held by a title other than that specially mentioned.*"

Warburton v. White, 18 Wash. 511.

Howlett v. Cheatham, 17 Wash. 626.

National Bank of Commerce v. Seattle Pickle Works, 15 Wash. 126.

Percival v. Cowychee Dist., 15 Wash. 480.

In

State v. Bankers' & Merchants' Mutual Benefit Ass'n, 23 Kan. 501,

Mr. Justice Brewer, then upon the Supreme Bench of Kansas, said:

"The Constitution has said that the title must be an index to the law, and the courts may not sanction as a valid enactment any part of a statute to which the finger of the title does not point. If we should attempt to enlarge the title, we should defeat the very purpose of the constitutional prohibition, which was to make the title to a bill notice of all contemplated legislation."

Citizens' Saving Bank v. Auditor General, 82 N. W. 214, (Mich); 123 Mich. 511.

State v. Board, 41 Pac. 145; 22 Nev. 399.

Van Houten v. People, 43 Pac. 137; 22 Colo. 53.

State ex rel Cooper v. Springer, 46 Atl. 589; 65 N. J. L. 161.

In this case the court said:

"To comply with the Constitution, the title of a proposed law must give reasonable intimation of the matters under consideration; and as the title must limit the enactment to matters within its scope, it follows that the legislation on which rests the present application is void."

Gray, Atty. Gen. v. Newark Co., 46 Atl. 606; 65 N. J. L. 51.

Walling v. Mayor, 44 Atl. 864; 64 N. J. L. 203.

Harris v. State, 36 S. E. 232; 113 Ga. 725.

Hayes v. Storms, 45 Atl. 809; 64 N. J. L. 514.

In re Brean, 14 Colo. 401.

Rex Lumber Co. v. Reed, 77 N. W. 572; 107 Iowa, 111.

Frazier v. Georgia R. R. & Banking Co., 28 S. E. 662; 101 Ga. 77.

Folkner v. Dorland, 24 Atl. 403; 54 N. J. L. 409.

Brooks v. People, 24 Pac. 553; 14 Colo. 413.

Ragio v. State, 6 S. W. 401; 2 Pickle (Tenn.) 272.

Thomas v. Wabash Ry. 40 Fed. 126.

Case v. Loftus, 43 Fed. 839.

Crowther v. Fidelity Ins. Co., 85 Fed. 41.

In

People v. Congdon, 43 N. W. 986; 77 Mich. 351,

the body of the act provided for *articles of adoption*, and that the child adopted should be the *heir* of the persons adopting. The court said:

"The law is plainly in violation of the constitutional provision that the object of the act shall be expressed in its title. The title of this act as passed and adopted is, 'An Act to provide for the *changing the names of minor children and of other persons.*'"

In

State v. Hancock, 32 Atl. 689 ; 58 N. J. L. 139,

the syllabus, which is by the court, is as follows:

"The title of an act being 'An Act to tax *intestates' estates*, gifts, *legacies* and collateral inheritance, in certain cases,' held, that the title did not express a purpose to tax *real estate devised*, and the provisions for that purpose were therefore invalid."

The Code of 1881 was not a re-enactment of former laws, but was a compilation of such laws as had theretofore been legally enacted, and of such laws as were enacted at the special session of the legislature in 1881.

Baer v. Choir, 7 Wash. 631, 637.
Gracie v. McKenzie, 3 Wash. 194, 197.
Northern Pacific R. R. Co. v. Ellison, 3 Wash. 225.

In

Baer v. Choir, 7 Wash. 631, 637, the Supreme Court

of the State of Washington, said:

"It has perhaps been a misfortune to the people of the territory and state that the acts of the legislature of 1881 have not for the most important part been printed except in the volume known as the 'Code' of that year, and this is an evidence of it, for the Civil Practice Act, passed

December 1, 1881, which ends with section 763, did not contain either of the sections above mentioned. Section 1294 was contained in an act entitled 'An Act relative to crimes and punishments and proceedings for criminal cases,' passed November 16, 1881, and section 1683 was contained in an act entitled 'An Act defining the jurisdiction and practice in the Probate Courts of Washington Territory,' passed November 4, 1881 (Abbott's Real Property Statutes, No. 339n). Both acts were approved December 1, 1881, and went into effect immediately, and wherever in the code the words 'this code' are found, the acts read 'this act' only. In the face of these facts it cannot be held that the sections quoted had or were intended to have effect outside of the domain of the laws of which they were parts."

We have examined the original enrolled act, in the office of the Secretary of State of the State of Washington, which was passed at the session of 1881, and which contains section 1329 of the code of 1881, which is the same as section 4605 of Ballinger's Code. That act is entitled "An Act defining the jurisdiction and practice in the Probate Courts of Washington Territory." It was approved December 1, 1881. Is sections, instead of being numbered 1 to 1686 consecutively, begin with section 1297 and end with section 1686. Its title is also set forth in Pierce's Washington Code, published August, 1902, at page 355.

If the act of 1873, was invalid, so far as it related to nuncupative wills, because its title was in conflict with the provisions of the organic act, the act enacted in 1881 which contains section 1329 of the code of 1881 and section 4605 of Ballinger's Code, is invalid for the same reason.

The only law in regard to nuncupative wills which has ever been legally enacted in the Territory or State of

Washington is the act of 1854, entitled "An Act relating to wills." That act limited the amount of the estate which might be bequeathed by a nuncupative will to two hundred dollars. Since its enactment there has never been an act legally enacted which dispensed with that limitation. That law therefore stands. The argument that, because the compilers of the code of 1881 omitted the word "nor" from the code of 1881, the section of the act of 1854 containing the word "nor" ceased to be the law, is utterly fallacious. The compilers of the code could not make law by putting a provision in the code, if such provision was not in an act duly passed by the legislature of the territory, neither could the compilers of the code repeal a section of the law of 1854 by failing to include in the code of 1881 a section of the law of 1854 which had never been repealed by the legislature.

In support of their contention that the subject of wills can be dealt with in an act entitled "An Act defining the jurisdiction and practice in the Probate Courts of Washington Territory," counsel for defendant cite, as a case directly in point in their favor, Johnston v. Harrison, 47 Minn. 575, where the title of the act which was questioned was "An Act to establish a probate code." Counsel have not, however, called the attention of the Court to that part of the decision in Johnston v. Harrison which is absolutely against their contention. The Court in that case distinguished between a probate code and a probate code of *procedure*. It is clearly competent for a legislature to enact criminal laws relating to many different crimes, under the title of a Criminal Code or Penal Code. It might be equally competent for a legislature to deal

with matters relating to wills under the title of a Probate Code, but that is *not ground for the argument that* a matter relating to the amount of an estate which might be bequeathed by nuncupative will could be included under a title stating that the act related to defining the jurisdiction and regulating the practice in the Probate Courts.

In

Johnston v. Harrison, supra,

the court said:

"In our judgment, much of the argument of counsel for respondent rests upon an entirely too limited and narrow definition of the meaning of the words 'probate' and 'code.' They seem to construe the title of the act as if it read 'An Act to establish a Probate Court code of procedure.'"

When we turn to the act of 1873, page 329, section 366, we find it there provided as follows:

"And the foregoing shall be the code of practice and procedure in the Probate Courts of this territory."

It was not a probate code which was enacted, but it was a Probate Court code of procedure. The title of the act, therefore, was sufficient for the purpose of indicating that the act was upon the subject of the jurisdiction and the practice of the Probate Court, but it was not sufficient for the purpose of indicating that the legislature was repealing the limitation upon estates which could be disposed of by nuncupative will, which had been prescribed by the act of 1854, and dispensing with all formalities

in regard to the execution of such a will where the estate bequeathed was *under two hundred dollars.*

The alleged nuncupative will under which Marie Carrau claims the entire estate, asserts that the estate bequeathed is worth "many thousands of dollars." It is, therefore, void upon its face.

In

Pierce v. Pierce, 46 Ind. 86.

the complaint was against the widow of one Pierce, and Jones, the administrator of his estate. The appellee was the mother of the deceased. The plaintiff claimed that she was entitled to one-half of the estate, and brought the action to settle the rights of the parties in the estate. The defendants set up a claim to the whole of the estate. This claim was based on an alleged nuncupative will, which it was averred had been made by the deceased, when a soldier of the United States in the Civil War, just as he was upon the point of leaving home in such service, and while in the possession of the property set forth in the complaint.

The court said:

"It may be considered, first, whether the alleged nuncupative will is valid or not, and, second, if it is not valid, what are the legal rights of the parties in the estate. * * * The sections of the statute bearing on the question are section 20, page 555, and section 21, page 556; 2 G. & H. They read as follows: 'Section 20: No nuncupative will shall be valid when more than the value of one hundred dollars is bequeathed nor unless it be made in

the last sickness of the testator * * *

THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON HAD JURISDICTION OF THE SUIT BETWEEN THE PARTIES TO CONSTRUE THE ALLEGED NUNCUPATIVE WILL AND DETERMINE THAT IT DID NOT CONVEY REAL ESTATE, AND THAT THEREFORE, EVEN IF IT WERE VALID, THE DECEDENT DIED INTESTATE AS TO HIS REAL ESTATE.

Washington adopted the common law.

"The common law, so far as it is not inconsistent with the constitution and laws of the United States or of the State of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

Pierce's Code, Sec. 249.
Ball. Code, Sec. 4783.

Substantially this same provision existed in territorial days, except that the word "Territory" was used in place of "State". Laws 1856, page 7. The territorial legislature, instead of creating the right to make a nuncupative will, recognized the right to make a nuncupative will as existing at common law, but saw fit to limit the amount of the estate which might be bequeathed, and to impose restrictions upon the execution and the proof of such wills. The language of the statutes is not that a person shall have the right to dispose of his estate by nuncupative will. The language is:

"No nuncupative will shall be good when the estate *bequeathed* exceeds," etc.

At common law, land could not be devised. The disability of the common law was partially removed by statute 32, Henry VIII. Prior to the statute of 32, Henry VIII, personal property could be disposed of by a nuncupative will. Real estate could not be disposed of by any kind of will. The statute 32, of Henry VIII, while allowing real estate to be devised, required the will to be in writing. Nuncupative wills remained unaffected by the statute. The Statute 29, of Charles II C. 3, imposed stringent restrictions upon nuncupative wills. The Statute of Washington imposed additional restrictions upon nuncupative wills, and provided that they should not be good where the estate bequeathed exceeded two hundred dollars in value. That the legislature of the Territory, when imposing upon the right to make nuncupative wills greater restrictions than were imposed by the Statute of Charles II, intended to change the common law so that such wills could dispose of real estate, is a proposition to sustain which no possible reason can be assigned. The matter, however, is placed beyond all possible doubt, because the legislature, by Section 24 of the act, in dealing with seamen at sea and soldiers in military service as a favored class, and while exempting them from the provisions of Section 23, expressly provided:

"Any mariner at sea or soldier in the military service may dispose of his wages or other personal property, as he might have done by the common law or by reducing the same to writing."

The contention of counsel for defendant that the legislature, by an act imposing greater restrictions upon the right to make nuncupative wills than were imposed by the

Statute of Charles II, and while exempting mariners at sea and soldiers in the military service from its operation so far as wages and personal property were concerned, conferred upon the unfavored class the power to devise real estate, by declaring "No nuncupative will shall be good when the estate *bequeathed* shall exceed," etc., is manifestedly unsound. Not only, however, did the legislature in the section of the act relating to nuncupative wills use the word "bequeathed," but in the sections of the act not relating to nuncupative wills, whenever dealing with the subject of lands passing by will, used the word "devise." Unless the object of language is to conceal instead of express thought, the legislature, in dealing with bequests under nuncupative wills, referred to personal property, for, when it dealt with wills relating to lands, it advisedly used the word "devise." From the language of the statute alone the matter is not doubtful, but in the light of the authorities there is no room for controversy.

That a nuncupative will cannot convey real estate is conclusively settled by an unbroken line of authorities.

In the case of

In re Davis' Will, 79 N. W. 761 (103 Wis. 455),

the Supreme Court of Wisconsin had before it for construction a nuncupative will in the following language:

"I give unto my wife the income of my entire estate during her widowhood. If she shall remarry, she is to have one-third of my estate, and the other two-thirds is to go to my children. Upon the death of my wife, my whole estate is then to go to my children. I appoint my brother Oscar F. Davis my executor."

The Court said:

"The only question for consideration is whether the words so spoken, and constituting the nuncupative will of the deceased, were effectual to pass the income of the real estate to the widow. * * * All wills, except nuncupative wills, must be in writing, and executed as prescribed. * * * And the statute further declares that 'no nuncupative will shall be good when the estate bequeathed shall exceed the value of $150.00 that is not proved,' as therein prescribed. * * * The word 'bequeathed' is commonly used with reference to the disposition of personal property; and the word 'devise' with reference to the disposition of real property. * * * We must hold that under our statutes a nuncupative will is inoperative to transfer title to real estate. This is in accordance with the rulings of other courts under similar statutes."

To the same effect are the following authorities:

Sadler v. Sadler, 60 Miss. 251.
McLeod v. Dell, 9 Fla. 451.
Smithdeal v. Smith, 64 N. C. 52.
Palmer v. Palmer, 2 Dana. 390.
Page v. Page, 2 Rob. (Va.) 424.
Lewis v. Aylott, 45 Tex. 190.
Pierce v. Pierce, 46 Ind. 86.
Schouler on the Law of Wills, Sec. 362.
Moffett v. Moffett, 67 Tex. 642.

VI.

THE CIRCUIT COURT OF THE UNITED STATES HAD JURISDICTION OF THE SUIT BY REASON OF COMPLAINANTS BEING ALIENS AND DEFENDANTS BEING CITIZENS OF THE UNITED STATES RESIDING IN THE STATE OF WASHINGTON, AND THE VALUE OF THE MATTER IN DISPUTE EXCEEDING THREE HUNDRED THOUSAND DOLLARS.

"Jurisdiction is the right to put the wheels of justice in motion, and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the Circuit Court of the United States under the express terms of the Act of August 13, 1888, if the plaintiff be a citizen of one state, the defendant a citizen of another, if the amount in controversy exceed two thousand dollars, and the defendant be properly served with process within the district. Excepting certain quasi-jurisdictional facts necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the Circuit Courts."

Ill. Cent. R. R. Co. v. Adams, 180 U. S. 28

In

Madison Traction Co. v. St. Bernard Mining Co., 196 U. S. 239,

this court had before it the question whether a condemnation proceeding instituted in the County Court of Hopkins County, Kentucky, under a statute which required commissioners to make an award of damages in writing, and required the Clerk of that court to issue process

against the owners to show cause why the report should not be confirmed, was a suit removable to the Circuit Court of the United States, and if so, whether, after a removal, the Circuit Court of the United States had jurisdiction in a suit in equity to enjoin the party seeking to condemn from prosecuting further proceedings in the County Court of the state.

At page 246, of the opinion, Mr. Justice Harlan said:

"Why could not the proceeding instituted in the County Court have been brought originally in the Federal Court? The case, as made in the County Court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different States; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the Circuit Court. It was therefore a proceeding embraced by the very words of the Constitution of the United States which declares that the 'judicial power shall extend * * * to controversies * * * between citizens of different States,' as well as by the act of 1887 (§1), which declares 'that the Circuit Courts of the United States shall have *original* cognizance, concurrent with the courts of the several States, of *all* suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, * * * in which there shall be a controversy between citizens of different States.' In view of these explicit provisions it is clear that the proceeding in the County Court was a suit or controversy within the meaning both of the Constitution and of the judiciary act. We could not hold otherwise without overruling former decisions of this court."

At page 247 of the opinion, the court quoted with approval from Boom Co. v. Patterson, 98 U. S. 403, as follows:

"'If the (that) inquiry take the form of a proceeding *before the courts* between parties—the owners of the land on the one side and the company seeking the appropriation on the other,—there is *a controversy which is subject to the ordinary incidents of a civil suit.*'"

And at page 248, the court, still quoting from the same opinion, said:

"'In Gaines v. Fuentes, 92 U. S. 20, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the Circuit Court, and that it had jurisdiction to determine the controversy.'"

THE CIRCUIT COURT HAD JURISDICTION OF THE CONTROVERSY BETWEEN THE PARTIES, AND ALL NECESSARY PARTIES WERE BEFORE THE COURT.

It is contended by counsel for Marie Carrau that the Circuit Court of the United States had no jurisdiction as a Federal Court, because it appeared that one Eugene Timothy Sullivan claimed to be the sole heir of the deceased John Sullivan; that Eugene Timothy Sullivan was a citizen of the State of Washington and Marie Carrau was a citizen of Washington; that Eugene Timothy Sullivan was an indispensable party to this suit, and that if made a party he would be a party plaintiff, and therefore the suit would have a citizen of the State of Washington as party plaintiff, and a citizen of the State of Washington as party defendant, and such joinder would oust the Circuit Court of jurisdiction.

The contention, in view of the pleadings and the record in this suit, is certainly novel.

The bill in this suit was filed on the 20th of June, 1901. The parties to the bill were complainants, who were subjects of the King of Great Britain and Ireland. The defendants were two citizens of the United States and of the State of Washington. The jurisdiction of the Circuit Court of the United States attached on that date. Eugene Timothy Sullivan filed no claim until the 23rd day of August, 1901. (See Carrau's Plea in Abatement, record, pp. 19-21.)

The proposition is elementary that if the jurisdiction of the Circuit Court has attached it will not be divested by reason of a transfer of interest to a person who could not have originally instituted the suit in the Circuit Court. It is also elementary that a person not possessing the requisite citizenship cannot oust the Circuit Court of its jurisdiction, which previously attached, by intervening in the suit.

Hardenberg v. Ray, 151 U. S. 112.

Therefore, so far as Eugene Timothy Sullivan is concerned, if the Circuit Court of the United States acquired jurisdiction of this suit on the 20th day of June, 1901, it could not be divested of that jurisdiction by Eugene Timothy Sullivan filing a claim as heir of the deceased in the Superior Court of the State of Washington. It might just as well be claimed that if Marie Carrau had been in possession of the real estate, and the complainants had instituted an action of ejectment against her in the

Circuit Court of the United States, Eugene Timothy Sullivan could have ousted the Circuit Court of jurisdiction by instituting an action of ejectment against her in the state court. If, however, it should be claimed that there were other persons, aliens, who also claimed to be heirs of the deceased, and that those persons could not be joined as defendants without ousting the Circuit Court of jurisdiction, it is sufficient answer that those persons were not within the jurisdiction of the Circuit Court and that they were not indispensable parties, and furthermore, that the complainants and defendant both claim that such persons have no interest in the estate.

By reference to the pleadings it will be found that the defendant Marie Carrau admitted that there were no persons nearer of kin to the deceased than first cousins. Complainants by establishing that they were first cousins of the deceased, became entitled to recover their shares in the estate. The admision of the defendant Marie Carrau appears at page 36 of the record. An examination of the answer of Marie Carrau will, however, fail to disclose that she pleaded a non-joinder of either necessary or proper parties. She did not allege that the deceased left any heirs. She merely pleaded that certain persons had *filed* claims in the state court. If a suit in ejectment had been instituted against her, it certainly could not be contended that she could defeat the jurisdiction of the Circuit Court of the United States by showing that persons, whose citizenship would have deprived the Circuit Court of the United States of jurisdiction if made parties, had instituted ejectment suits against her in the state court. Not only, however, did she not plead that there was a non-joinder

of indispensable parties, but she endeavored to prove that complainants were not relatives of the deceased, because she claimed that the deceased left no relatives. Her claim, therefore, is that because certain parties had filed claims in the state court alleging that they were the only heirs of the deceased, and that both the complainants and herself contended that the persons filing such claims had no interest in the estate, the fact of the filing of the claims divested the Circuit Court of jurisdiction to determine the controversy before it where the parties on one side were aliens, and on the other citizens of the United States.

It is certainly a novel proposition that a person who all parties to a suit say has no interest in the property is such an indispensable party to a suit to determine the title to that property that no decree can be rendered in the suit without his joinder, and yet if joined his joinder will divest the court of jurisdiction over a controversy between parties claiming the property, between whom the requisite diversity of citizenship does exist.

If it was the intention of Marie Carrau to divest the Circuit Court of the United States of the jurisdiction which had attached, by showing that parties, whose citizenship, if such parties were joined, would oust the Circuit Court of jurisdiction, were indispensable parties, it was incumbent upon her not only to plead that fact but to prove it.

To her answer the complainants filed a general replication. Evidence was taken in the suit. Complainants offered evidence which proved that they were the only first

cousins, heirs at law and next of kin of the deceased. The defendant Carrau admitted by her answer that there were no persons nearer of kin to the deceased than first cousins. She introduced evidence for the purpose of establishing that the complainants were not related to the deceased because he died without relatives. We submit, therefore, that there is no foundation for the claim that there were any persons who should have been joined as parties other than those who were before the court.

The authorities sustain the proposition that all of the necessary parties to the suit were before the court.

In

Williams v. United States, 138 U. S. 514,

certain lands in controversy had been certified to the State of Nevada. The state made a contract with appellant for the sale to him, he paying one-fifth of the purchase money at the date of the contract, and contracting to pay the balance in subsequent installments. The United States filed a bill in the Circuit Court for the District of Nevada against appellant alone. The scope of the allegation of the bill was that the lands were improperly certified to the state. The prayer of the bill was for the cancellation of the contract between appellant and the State of Nevada, and an adjudication that appellant had no interest or title in the lands, and that he be directed to surrender to the state for cancellation all contracts and agreements which he had with the state. The court said:

"The first contention of appellant is that this action could not be maintained, because the State of Nevada was

not made a party, it holding the legal title. * * * With respect to the first contention, it cannot be doubted that the certification operated to transfer the legal title to the state (Frasher v. O'Connor, 115 U. S. 102), nor that the contract between the state and appellant passed to him the equitable title, the legal title being retained by the state simply as security for the unpaid part of the purchase money. *The proposition, therefore, is that where there are outstanding two interests or titles held by different parties, the real owner cannot proceed against either without joining the other; that only one action can be maintained to divest these parties of their separate titles, and that to that action both adverse holders must be parties. The proposition is not sound. A court of equity has jurisdiction to divest either one of the adverse holders of his title in a separate action.* Doubtless the court has power, when a separate action is instituted against one, to require that the other party be brought into the suit, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title in one action, but such right does not oust the court of jurisdiction of the separate action against either. It has jurisdiction of separate actions against each of the adverse holders, and there is no legal compulsion, as a matter of jurisdictional necessity, to the joinder of both parties as defendants in one action. There are special reasons why this rule should be recognized in this case. It may be that the Circuit Court would not have jurisdiction of an action against the state; that an action against a state on behalf of the United States can be maintainable only in this court, and that, when brought in this court, no other party than the state can be made defendant. We do not decide that the things are so, but suggest the difficulty which must have presented itself to the counsel for the government, and which justifies a separate suit against the holder of the equitable title."

In

Kerr v. Watts, 6 Wheat. 550,

this court said:

"No one need be made a party complainant in whom there exists no interest, and no one party defendant from whom nothing is demanded. Watts rests his case upon the averment that all the interests once vested in O'Neill and the Scotts now center in himself, and provided he can recover the land now in possession of those actually made defendants, he is contented afterwards to meet the just claims of any others who are not made defendants. No rights will be affected by his recovery but those of the actual defendants and those claiming through him."

In the case at bar, these complainants are entitled to relief against the defendants actually before the court, and are content afterwards to meet the claims of any others who are not made defendants. These complainants say there are no others who should be made defendants. The defendant Carrau says that there are no relatives of the deceased. If the claim of these complainants is true, there is no need to make the absent claimants parties. If the claim of the defendant Carrau is true, there is no need to make them parties. If persons other than those before the court had any rights in the estate, the decree in this suit would not affect them.

Elmendorf v. Taylor, 10 Wheat. 152.
Vattier v. Hinde, 7 Pet. 252, 263.
Storey v. Livingstone, 13 Pet. 359, 375.
Joy v. Wirts, Fed. Case 7554.
House v. Mullen, 22 Wall. 42.
Ry. Co. v. Stewart, 95 U. S. 284.
Dick v. Balch, 8 Pet. 36.
Williams v. Gibbs, 17 How. 239.
U. S. v. Hendy, 54 Fed. 447.
Billings v. Aspen Min. Co., 51 Fed. 338.
Harrison v. Urau, Fed. Case 6146.

Union M. Co. v. Dougherty, 81 Fed. 73.
Smith v. Lee, 77 Fed. 779.
Hamilton v. Savannah R. R., 49 Fed. 412.
Society v. Hartland, Fed Case 13155.

VII.

UPON THE LAW AND FACTS OF THE CASE, THE DECREE OF THE CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, IF IT SHOULD BE REVIEWED, SHOULD BE AFFIRMED.

The Circuit Court of the United States found complainants to be the first cousins, heirs at law and next of kin of the deceased, John Sullivan, and as such, entitled to all of his real and personal property. It found that John Sullivan died intestate; that he never attempted to make a will, nor did he speak the words nor any words of similar import, which Mary Craven claimed that he spoke and intended as a will. The Circuit Court found that the attempted probate of the will was a mockery; that the decree of probate had been rendered without jurisdiction; that the court entering the decree had never acquired jurisdiction to hear any proof in support of the pretended will; that the citation which the court issued, calling on the heirs and next of kin to appear and contest the probate of the alleged nuncupative will was made returnable on the day it was issued, and at an hour which had already passed; that the time for probating the alleged nuncupative will had expired, and that it never could, even if any

cuted, be probated. The decree, therefore, enjoined the defendant Marie Carrau and all persons claiming under her and representing her, from setting up any claim to the estate of John Sullivan, deceased, under the alleged nuncupative will and the void and fraudulent decree of probate, and it directed the administrator of the estate to recognize the complainants as the heirs at law and next of kin of the deceased, and as such entitled to their shares in the estate.

The findings of fact of the Circuit Court, that complainants were first cousins, the heirs at law and next of kin of the deceased, and that the alleged will was never made or attempted to be made by the deceased, under the rulings of this court and of the Circuit Courts of Appeals, must be presumed to have been correct, and will not be disturbed unless an obvious error has been made in the application of the law to the facts, or some serious and important error has been made in the consideration of the evidence.

Tilghman v. Proctor, 125 U. S. 136.
Kimberly v. Arms, 129 U. S. 512.
Tate et al v. Holmes et al, 76 Fed. 664, 667.
Bank v. Rogers, 53 Fed. 776.
Warren v. Burt, 58 Fed. 101.
Savings & Loan Society v. Davidson, 97 Fed. 696.

In the case at bar, however, not only are the findings by the Circuit Court sustained by the evidence, but upon the evidence two reasonable minds could not have differed. The rule announced in the cases above cited applies where the evidence is conflicting. In the case at bar the evidence demonstrates the correctness of conclusion reached by the Circuit Court.

COMPLAINANTS ARE FIRST COUSINS, HEIRS AT LAW AND NEXT OF KIN OF THE DECEASED JOHN SULLIVAN.

We now invite the attention of the court to a review of the evidence establishing the fact that the complainants are first cousins, heirs at law and next of kin of the deceased John Sullivan, and as such entitled to his estate.

We will trace the history of John Sullivan of Seattle backwards, instead of beginning with his ancestors and tracing down.

John Sullivan, of Seattle, wrote to Mr. Gregg, a solicitor in Cork, requesting advice as to what was necessary in order to take out administration on his sister's estate. On November 18, 1895, he wrote as follows:

Exhibit "W" (795).

Sullivan Building, Seattle, Wash. U. S. A.

November 19, 1895.

Mr. Robert Gregg.

Dear Sir: I wish to correspond with you in regard to an estate left by my sister Eliza Sullivan, deceased. The estate consists of one hundred and fifty pounds, 10-4, Cork Savings Bank. Mr. H. Carr Cave kindly gave me your address. You will please let me know what the cost will be for administration in the above estate, as near as you can give it, such as solicitor, administrator and court fees, and whether I can name who the administrator is to be. All information in regard to the above matter will be thankfully received.

Most respectfully,

JOHN SULLIVAN.

I have enclosed some old stamps for Mr. H. Carr Cave's boy, which you will please send to him.

J. S.

To this letter Mr. Gregg replied as follows:

Complainants' Exhibit "X." (796)

Robert Gregg, Solicitor, Commissioner for Administering Oaths.

Offices 67 South Mall, Cork.

Decr. 7th, 1895.

Mr. John Sullivan, Sullivan Building, Seattle, Washington, U. S. A.

Eliza Sullivan dec'd.

Dear Sir: I recd yours of 19 ulto and have seen Mr. Cave and given him the stamps for his son, for which he desired me thank you.

It is rather difficult to say exactly the amount of costs of obtaining admon to decd. So much depends on circumstances. If you were here, and took out the administration in person, and that you are the only next kin, the outside cost would be about £10. If, as I say, there was no other next of kin, father, mother, brother or sister, or child of dec'd brother or sister, and that you wished to appoint any person here to obtain the administration for you, which you could do by executing a power of atty to that person, of course this would add to the expense say probably £3, but it must be sworn to, if it be the fact, that you are the only brother and only next of kin of said deceased, which I presume to be the fact. I think I have given you all the information in my power, and await your further instructions. I may also tell you that if you were to come to Cork for the purpose of taking out the administration and that you have any friends who would kindly enter into the necessary administration bond, the entire matter would be completed

within at the outside a fortnight exclusive of holydays, which commence at Christmas and continue for about ten days after.

I remain truly yours,

ROBT. GREGG.

Both of these letters were offered in evidence by complainants' counsel, for the purpose of establishing the identity of John Sullivan of Seattle, the owner of the Sullivan Block, with the John Sullivan of Seattle who administered upon the estates of Eliza or Bessie Sullivan and Ellen Silva, and were objected to by counsel for the administrator on the ground that they were incompetent, irrelevant and immaterial.

The letters of John Sullivan to Mr. and Mrs. Lyons and to Eugene F. Collins, solicitor, show clearly that John Sullivan of the Sullivan Building, Seattle, Washington, was a brother of the Bessie Sullivan who was placed in an asylum for the insane in Cork. On April 29, 1879, John Sullivan wrote to Mr. Lyons as follows:

Exhibit "Y" (519).

"Seattle, Wash. Ter., April 29, 1879.

Thomas S. Lyons, Esq.

Dear Sir: Your valued favor of March 30 came duly to hand. I am very much pleased with the course you have pursued and the interest you have taken in my sister's welfare and also the kind attention extended by your sister-in-law. I am very grateful to each of you for your kind attention to my sister in her affliction. I am really sorry to know that there is no prospect of her recovery. You have done perfectly right in having my sister placed

in a asylum where she will be taken good care of, and having sufficient money on hand to pay for her maintainence I think it is right to have it expended in making her as comfortable as possible under the circumstances.

Hoping that you will continue your kind attention to my sister, I am

Most gratefully yours,

JOHN SULLIVAN.

On October 7, 1882, Sullivan wrote to Mr. Lyons:

Exhibit "Y2" (520).

Seattle, Wash. Ter., October 7, 1882.

Mr. Thomas S. Lyons:

My Dear Sir: Your very kind letter of August 31, with statement of my sister's bank account came duly to hand. I really must say it is quite satisfactory. You will please continue the same arrangements in regard to the care of my sister, and draw from her own fund for her maintainence. I see that she has sufficient to her credit to keep her some time. Believe me that I will bear in mind and see to it that her account in the bank is not entirely drawn. Please mention to Mrs. Lyons I am very grateful to her for her kindness in furnishing my sister with clothing, boots, etc., also the number of new papers that she so kindly sent me. They are the first from my native city that I have had the pleasure of reading for a number of years. I have sent you by Wells, Fargo & Company's Express a few table mats for Mrs. Lyons. When received you will please be so kind as to hand them to her. They are made by Indian women living on the sea-coast of this Territory.

Believe me, kind sir, your very humble servant,

JOHN SULLIVAN.

Exhibit "Y4" (521) acknowledged the receipt of a letter from Mrs. Lyons, dated March the 5th; also a bunch of shamrock.

Exhibit "Y6" (522), July 15, 1887, thanks Mrs. Lyons for her kind attention to his sister in her great affliction.

Exhibit "Y8" (523), dated August 20th, 1892, is to Mrs. Lyons, and acknowledges the receipt of photographs from Cork and Belfast. It then proceeds:

"I was grieved to hear of the loss that you have sustained in the death of Mr. Lyons, and later, of your dear son. I offer you my most sincere and heartfelt sympathy, and may God comfort and help you in your heavy loss. I regret that I did not receive those letters that were returned to you. I was absent from the city at that time, travelling. I left August 18, 1888, and returned May, 1889. June 6th, 1889, a fire wiped out the business portion of the town. My buildings were wiped out with the rest. For a year after I was very busy rebuilding. In the meantime we had the streets widened and straightened. Now we have got a respectable looking town, good buildings and wide streets."

The letter proceeds to describe the town, and then concludes:

"*My address is Sullivan Building, Seattle Wash.*, U. S. A. Thanking you for your kind remembrance, I am

Yours very truly,

JOHN SULLIVAN."

Exhibit "Y19" (529).

Seattle, Wash., U. S. A., December 16, 1896.

Mr. E. F. Collins,

Dear Sir: Your valued favor of the 30th November just to hand. I have enclosed herewith the power of attorney, duly signed and acknowledged. *I wish to state that my deceased sister Ellen, who was married, had no children. I am the only heir.* I received a letter from Mrs. E. Lyons a few days ago, stating that she had met you in Dublin, and that you kindly consented to take up the matter of my deceased sister's estate. Mrs. E. is very kind. She has taken quite an interest in this matter for me. I am pleased to know that you have succeeded in getting the consent of such a responsible gentleman as Mr. Roache to act as administrator in this estate. I am

Very respectfully yours,

JOHN SULLIVAN.

Address Sullivan Building, Seattle, Wash., U. S. A.

(For the letter of November 30th, 1896, see page 110).

In Exhibit "Y20" (529), he refers to administration on Bessie's estate.

Exhibit "Y21" (530).

Seattle, Wash., U. S. A. July 8th, 1897.

M. Eugene F. Collins,

Dear Sir: You will please inform me what progress have been made in the settlement of the estate of Eliza Sullivan, deceased, and how soon will you be able to close the matter up, and oblige

Very truly yours,

JOHN SULLIVAN.

Address Sullivan Building, Seattle, U. S. A.

(Answered by Mr. Collins, August 16th, 1897. (110).

Exhibit "Y22" (530).

Seattle, Wash., U. S. A., March 1, 1899.

Mr. Eugene F. Collins.

Dear Sir: Your valued favor of February 1st came duly to hand, with power of attorney enclosed. I wish to say that I will defer taking any action in that matter for the present, as I am going to the Paris Exposition. I will make a visit to Ireland, and while there I will look up that matter. I thank you and Mrs. Lyons for the interest you have taken in my behalf.

Most respectfully yours,

JOHN SULLIVAN.

(For Mr. Collins' letter of February 1st, 1899, see page 109, and for his answer (109)).

Exhibit "Y23" (530).

Pembroke Street, Cork, May 19, 1900.

E. F. Collins.

Dear Sir: I arrived to-day at the Imperial Hotel. I would be pleased to see you in regard to my deceased sister's estate.

Yours truly,

JOHN SULLIVAN.

Answered by Mr. Collins (108).

Exhibit "Y10" (524).

Pembroke Street, Cork, May 19, 1900.

Dear Mrs. Lyons: You will be surprised at knowing that I am in my old home town, Cork, after an absence

of forty-one years. I arrived this morning. First thing I did after registering my name at the hotel was to walk along the Grand Parade and Patrick Street. The streets do not look quite familiar to me as yet, but will after short acquaintance. I have written to Mr. Eugene F. Collins today, and will have him look after the money in the bank which belonged to my deceased sisters Ellen and Bessie. I am on my way to the Paris Exposition, and hope to have the pleasure of seeing you before long.

Yours very truly,

JOHN SULLIVAN.

Exhibit "Y12" (525).

Pembroke Street, Cork, May 30, 1900.

Dear Mrs. Lyons: Your very kind letter of the 21st inst. was received. I was very much pleased to know that I was not a stranger in Ireland. I am certainly one in Cork. I have not found any person in Cork that I know. I called on Mr. Breton, Patrick Street, Jewellers. I found the grandson managing the business. All the rest were dead. I worked for the grandfather. I have been out to the lakes of Killarney. I will tell you what I think of the lakes when I see you next Saturday.

Yours very truly,

JOHN SULLIVAN.

Exhibit "Y14" (526), is a letter to Mrs. Lyons, dated June 9th, 1900. In it he mentions that he told the lawyers to send the money to his bankers in Seattle when the month was up, as he did not wish to return to Cork again.

Exhibit "Y16" (527).

Seattle, Wash., U. S. A., September 12, 1900.

Dear Mrs. Lyons: You will see that I am at my old home. I arrived here a short time ago after a very en-

joyable trip. Business is very good here. My building is full of tenants, and of course I am getting a good rental from the building. Other properties which I have are increasing in value. Do not be surprised when I say that I am going to leave for Paris the last of this month. I will spend the winter there. When the weather gets cold in Paris, I will go down to Monte Carlo. I have just received the money from Wynne & Wynne, lawyers, of Cork, 153 pounds 12-10. I brought the inclosures with me from Paris. Am learning French. Do not be surprised if I should write my next letter to you in French.

Hoping that you are enjoying the best of health; give my kindest regards to your children; their names have slipped my mind at this writing. I am

Very truly yours,

JOHN SULLIVAN.

The affidavit of John Sullivan as administrator of the estate of Eliza Sullivan describes her as "late of Bull's Asylum," and states that he was the brother of Bessie Sullivan. Exhibit "M" (788).

The affidavit of John Sullivan as administrator of the estate of Ellen Silva, late of Evergreen Street, states that he is her only brother and next of kin. Exhibit "N," (789).

Administration in Cork was granted to John Sullivan, formerly of Seattle, on the estate of Eliza Sullivan, late of Bull's Asylum. Exhibit "O" (790).

Administration was granted in Cork on the estate of Ellen Silva, late of Evergreen Street, to John Sullivan, formerly of Seattle, Wash., U. S. A. Exhibit "P" (791).

In the bond executed by Sullivan and Collins in the matter of the estate of Ellen Silva, Ellen Silva is de-

scribed as "late of Cronin's (Crone's) Lane." A pen is then run through the name Cronin's Lane, and the words "Evergreen street" interlined. Exhibit "Q" (792).

A tombstone was erected at the grave of Ellen Silva in the Botanic Gardens in Cork. Exhibit "K," (787). The inscription is as follows:

"Sacred to the memory of Ellen Silvie, Died November 27, 1871, aged thirty-five years. R. I. P."

The graves of the father and mother of John Sullivan could not be found, but the grave of Ellen Silvie was opened, and in it were found two coffin plates.

Exhibit "L," (787), shows that on one coffin plate appears the following inscription: "Abigail Sullivan, Died July 26, 1872, aged 66 years. Peter O'Sullivan, Died Aug. 19, 1873."

The testimony of *Michael O'Regan*, (742), is as follows:

"Q. Do you know where the grave of Ellen de Silva is?

A. Yes, I do, so far as the tombstone is concerned.

Q. Have you with you a copy of the inscription on that tombstone?

A. I have.

Q. Please produce it. Did you make this yourself?

A. I did.

Q. I show you a paper marked Complainants' Exhibit 'K,' and ask you if you have copied that from the tombstone of Ellen Silva in the Botanic Gardens?

A. I have done so. The stone is low and I came down on my face and hands.

Q. Is that a copy?

A. It is a true copy.

(Complainants now offer in evidence Complainants' Exhibit 'K.' Mr. Riddle objects to the paper, on the ground that it is incompetent, irrelevant and immaterial).

* * * * *

Q. Did you ever see any coffin plates in that grave?

(Mr. Riddle raises an objection on the grounds last stated).

A. Yes.

Q. How did you come to see those coffin plates?

A. I got commands from Mr. McCarthy that he had a letter from Mr. Julian to see all such matters; accordingly I brought them in with me, and I stayed there until they dug up the breastplate.

Q. Then you did see the grave opened?

A. I saw the grave opened opposite the stone Silva.

Q. Did you find in that grave the coffin plate of Peter Sullivan?

(Mr. Riddle objects on the same ground as before, and on the additional ground of a leading question).

Q. What of that coffin plate did you find there?

A. I found Peter Sullivan and Abigail.

* * * * *

Q. I ask you if the following is a true and correct copy of what appeared on the breastplate to which you have referred? 'Abigail Sullivan, died July 26th, 1872, aged 66 years. Peter Sullivan died August 19th, 1873.' Is that a true and correct copy of what appeared on these breastplates?

A. Yes.

Cross-examined by Mr. DONEGAN (744).

Q. How many times was this grave opened up?

A. Twice.

Q. At whose instance in each case?

A. Mr. McCarthy gave me orders the first time to open it, and secondly I opened it before the solicitors.

Q. I understand you to say that you got instructions from Mr. McCarthy to open the grave first of all. Now, who is Mr. McCarthy?

A. He is the curator of the cemetery."

Ellen Silva was before marriage Ellen Sullivan. On June 3, 1854, Ellen Sullivan was married to Emanuel S. de Silva. The witnesses to this marriage were Peter Sullivan and John Sullivan. Exhibit "E" (783).

Denis Riordan, a resident of Cork, 76 years of age, who had lived at No. 2 Crone's Lane since he was a year and a half old, testified that he knew Peter Sullivan, his wife, his two daughters, Bessie and Ellen, his son John, and Hannah Callaghan, who lived with them. He testified (650):

"Q. Do you remember Ellen Sullivan? A. Yes.
Q. She was married? A. Yes.
Q. To whom?
A. To a foreigner named Emmanuel de Silva.
Q. What became of him?
A. He went to sea and died in the West Indies.
Q. Did Ellen leave any children? A. No."

Margaret McGrath, a second cousin of John Sullivan, a resident of the vicinity of Cork, born on the Hanlon road, testified that she heard of the marriage of Ellen, but did not know John (635).

Hannah Callaghan, complainant, testified (653) that she knew John's two sisters, Bessie and Ellen.

"Q. Was either of them married (664)?
A. Yes, Ellen married.
Q. To whom?

A. [illegible]
Q. What was his occupation or calling?
A. [illegible]
Q. Do you recollect Ellen's death?
A. Yes, I do; well.
Q. Had she any family?
A. No, sir; never had any.
Q. Do you recollect what became of Bessie?
A. She died insane, in Bluff's Asylum."

Daniel Burke, a schoolmate of John Sullivan at the South Monastery, testified as follows [illegible]:

"Q. And now, what are the names of the sisters?
A. Bessie and Ellen, sir.
Q. Do you recollect whether either of them were married?
A. Ellen was married.
Q. Do you remember what her husband's name was?
A. A foreign sailor."

Bessie Murphy, an employee at Bramhall & Crawford's Brewery, for fifty-three years, testified [illegible]:

"Q. What became of Bessie Sullivan?
A. Bessie Sullivan died in an asylum.
Q. Had Ellen Sylvia ever married?
A. She married a Portuguese captain.
Q. What became of him?
A. He died."

Ellen Buckley testified to the marriage [illegible].

Ellen Sheridan [illegible].

Anne Kirby [illegible].

Bridget Crowe [illegible].

Catherine Murphy [illegible].

Anne McDermott [illegible].

Margaret Cronin (739).

Mary O'Leary (746).

Ellen Sullivan was the daughter of Peter Sullivan and Abby Sullivan, formerly Abby McAuliffe. Baptismal certificate of Ellen Sullivan, Exhibit "C" (780). Ellen was baptized on the 3rd of January, 1836, at the Church of St. Finbarr. The sponsors of Ellen Sullivan were William Murphy and *Mary Sullivan*.

Bessie Sullivan was the daughter of Peter Sullivan and Abby Sullivan, formerly Abigail McAuliffe. Baptismal certificate of Bessie Sullivan, Exhibit "B" (778). Bessie was baptized on the 17th of January, 1834, at St. Finbarr's.

John Sullivan was the son of Peter Sullivan and Abby Sullivan, formerly McAuliffe. He was baptized at the Church of St. Finbarr's on the 27th of June, 1840. The sponsors were Humphrey Sullivan and Bridget Callaghan, Exhibit "D" (781).

It will appear later on that Humphrey Sullivan was the husband of Mary Sullivan, who was formerly Mary McAuliffe, a sister of Abigail or Abby McAuliffe. Humphrey Sullivan and Mary Sullivan were the grandparents of the Riordan claimants. Bridget Callaghan, the sponsor of John, was formerly Bridget McAuliffe, a sister of Abigail McAuliffe the mother of John.

Denis Riordan testified (648), that he is 56 years of age, lived at No. 2 Crone's Lane since he was a year and a half, knew the family of Peter Sullivan, and that Peter

Sullivan, his wife, his two daughters, Bessie and Ellen, John Sullivan and Hannah Callaghan constituted the family.

Hannah Callaghan (664) testified that the family consisted of Peter and Abina and three children. Bessie, who died insane, was the oldest; the second was Ellen, and the youngest was John.

Daniel Burke, a schoolmate of John Sullivan at the South Monastery, testified (683) that the family consisted of John's father and mother, John, Bessie and Ellen, and that Hannah Callaghan lived with them; that he was very intimate with John, and recollected John's going to sea.

Denis Murphy, an employee of Beamish & Crawford's Brewery for 53 years, testified (694) that he knew Peter Sullivan remarkably well; that he knew the rest of his family consisted of his son, two daughters, and wife, and Hannah Callaghan, who was the niece of the wife of Peter Sullivan.

Ellen Corbiy, a resident of 114 Evergreen Road, Cork, about 64 years of age, testified (699) that she knew Peter Sullivan and his wife; that Peter Sullivan's wife was Abina or Abigail McAuliffe; that their three children were Bessie, Ellen and John; that Ellen was married to Emmanuel Silva; that Bessie died unmarried at Bull's Lunatic Asylum; that John, when a boy, was employed in Breton's, a jeweler's in Patrick street, for a short time; that Hannah Callaghan lived with Peter and Abina Sullivan, and that she was the niece of Mrs. Sullivan; that she remembered when Hannah Callaghan was brought to the

Sullivan house; that she was an orphan, and was told by the Sullivans that she was the niece of Mrs. Sullivan. She testified that Ellen Sullivan was the godmother of her child. She was cross-examined by Mr. Riddle:

"Q. Were you living in Crone's Lane when you knew John Sullivan?

A. I was in the same house with him" (704).

Ellen Davidson testified (706) that she is about sixty-four years of age; knew Peter Sullivan and his wife well. His wife's name was Abina. Was in Crone's Lane when the Sullivans came there to live. Peter Sullivan was employed at Beamish & Crawford's brewery. They had three children. Their names were Bessie, Ellen and John. Hannah lived with them. Hannah Callaghan was the child of Mrs. Sullivan's sister, and was treated as one of the family. Recollects Bessie going into service as a little girl. She was in the service of Mrs. Lyons. At page 707 she testified that she knew John Sullivan well. She was asked the question if she knew where John was born. She answered, "In the very same house." John lived seven houses away from the one in which she lived. They played together as children. John's mother used to beat her for the way she treated John. John was employed at one time at Mrs. Russell's in Princess street, a confectionery store.

Nora Kiely testified at page 717 that she lived at 85 Tower street; lived there forty-three years. Tower street is fifty or sixty yards from Crone's Lane. Knew Peter Sullivan when he lived in Evergreen street. He worked at Beamish's brewery. He had a son and two daughters. His wife's name was Abina Sullivan. They had three children,

two girls and a boy. The boy's name was John, the girls' names were Elizabeth and Ellen. Knew Ellen perfectly well, but did not know much about Elizabeth. Never knew John. Elizabeth was always in a situation. Worked for a lady by the name of Mrs. Lyons. Ellen married. Her husband's name was Silva. Knew Hannah Callaghan well. Knew her for thirty-five or thirty-six years. She lived with her aunt, Mrs. Sullivan. That Mrs. Sullivan was the wife of Peter Sullivan. Hannah was generally known as the niece of Abby Sullivan. Never heard any claim to the contrary. Hannah Callaghan lived with the Sullivans. Hannah Callaghan, whom she knew living with the Sullivans, is the complainant in this suit. The maiden name of Abina Sullivan before she married Peter Sullivan was Abina McAuliffe. Elizabeth died in Bull's Asylum. The back door of the witness and the back door of Peter Sullivan opened on a small square. There were about forty or fifty yards between the back gates. At page 720, on cross-examination, she testified she had always known the surname of Abina. Knew it was McAuliffe. Remembers when Ellen died. It was about twenty-nine or thirty years ago. Witness buried a child at the same time, and therefore had reason to remember it. Bessie died about twelve or thirteen years ago. Knows she was in Bull's Asylum. Knew a girl in Bull's Asylum who was minding her when she died. At page (721) she testified that she knew that Hannah Callaghan was related to Bessie. The old woman told her she was her niece, a first cousin of Bessie. At page (721) she testifies that she had been in the house with Peter Sullivan about a dozen times.

Bridget Cronin testified, at page (722), as follows: Lives at 11 Abbey street, off of Evergreen street. Is about

sixty years of age. Knew Peter Sullivan and his wife. His wife's name was Abby McAuliffe. They lived in Evergreen street. Their household consisted of their three children, Bessie, Ellen and Johnny. Hannah Callaghan resided in the same house with them. Hannah Callaghan was the first cousin of the Sullivans—Mrs. Sullivan's sister's daughter. She was Mrs. Sullivan's niece and first cousin to the Sullivan children. Bessie never married. Ellen married a man named Silva. Remembers John. He was Peter's son. When she first recollects him, he was about twelve or fourteen years of age. Heard Abby Sullivan say that she had heard from John. Recollects the death of Abby Sullivan, Peter Sullivan and Ellen. Saw their funerals. They were buried in the Botanical Gardens. Hannah Callaghan lived with the Sullivans as long as she can remember. Mrs. Sullivan told her that Hannah Callaghan was her sister's daughter. Peter Sullivan was the last of the Evergreen street household to die. Hannah Callaghan, who is the complainant in this case, is the same Hannah Callaghan whom the witness knew to be the niece of Abby Sullivan. Peter Sullivan worked in Beamish & Crawford's brewery.

Cross-examined by Mr. DONEGAN (725): Had an intimate knowledge of the Sullivans for years. Always knew them in the neighborhood. Knew them in Evergreen street. Heard Abby Sullivan say that she was very fond of her sister's daughter; she thought as much of her as her own children. She was her aunt.

Catherine Murphy testified (728): Is sixty-six years of age. Lives in Crone's Lane, No. 5. Was born in Tower street. Tower street is a few yards from Crone's Lane.

Knew Peter Sullivan and his family well. They were five in number. Peter Sullivan worked at Beamish & Crawford's brewery. His wife's name was Abby, or Abina McAulliffe before her marriage, and Sullivan by her husband's people. They had three children, two daughters and John. The daughters' names were Ellen and Bessie. When she first knew them, they resided in Crone's Lane. They then moved to Evergreen street, nearly opposite Nicholas street. Knew Bessie and Ellen well. Witness and they were schoolgirls at the Presentation Convent school. Bessie went to Mrs. Lyons' to live, as a domestic servant. Often walked with Bessie on the way to Mrs. Lyons'. Bessie lost her reason and was put in an asylum. Ellen and the witness learned shirt-making after they left school. They worked at Dowden's in Patrick street. They worked at the same table. Ellen married a foreigner, a stranger in Ireland. He was a sailor. Witness was present at the marriage. Remembers John Sullivan, Peter Sullivan's son, when he was a little boy. Recollects his going to school. After he left school he got employment in the city. At first he did not sail foreign. Afterwards he did. After he went foreign she never saw him again. Knows that he went to America. He was about twenty to twenty-one or twenty-two when he went foreign. Was very intimate with the Sullivan family. The reason for the intimacy was that her mother and Abina McAuliffe were both from Carrigaline. The intimacy sprang up between the children, and continued. The mothers continued their friendship. The household of Peter Sullivan consisted of himself, his wife, his three children, and Hannah Callaghan. Recollects when Hannah Callaghan went to the Sullivans to live. She was about eight or ten. Knew her in-

timately. Hannah Callaghan's mother's name was Bridget McAulliffe, by her parents, and Bridget Callaghan by her husband. Hannah Callaghan lived with the Sullivans on account of the death of her parents. She was treated by the Sullivans as one of their own children. Heard Hannah Callaghan call Abina aunt. Knows that John Sullivan wrote to his parents. Hannah Callaghan lived with the Sullivans until the break-up of the Sullivan family about thirty years ago. The break-up was caused by the death of the Sullivans. The father of the Sullivan family died last. Hannah Callaghan, the claimant, is the same Hannah Callaghan whom she knew living with the Sullivans.

Nora O'Connell testified (733): Lives in Evergreen street. Was born there. Is fifty years old. Recollects Peter Sullivan, who lived in Evergreen street. He worked at Beamish & Crawford's brewery. His wife's name was Abby McAulliffe. They had three children, Bessie, Ellen and John. Ellen was a friend of the witness'. Bessie took a situation at Mrs. Lyons'. Ellen was at home. Ellen married. Married a foreign sailor of the name of Silva. She had no children. Ellen worked for Dowden's at Patrick street, and for Fowler & Scully of Patrick street, too. Saw John once when he was a young man. He went to America. Witness was very intimate with Ellen. Used to visit Ellen at her house. Knows that the parents received letters from John. Ellen used to tell her that they did. When visiting at the Sullivan house, she saw Hannah Callaghan living with them. Hannah Callaghan lived with them until the household was broken up by the death of Peter Sullivan, her uncle. Heard Hannah Callaghan address Abina Sulivan as Aunt Abby. Ellen Sullivan

died first. Witness attended her funeral. She was buried in St. Joseph's Cemetery, formerly Botanical Gardens. Witness saw her dead. The mother of the Sullivan family died next; then the father. Abina Sullivan died about twenty-nine years ago. Hannah Callaghan was treated as one of the family. Bessie went to the asylum. Witness knows that Hannah Callaghan, the complainant, is the same Hannah Callaghan who resided with the Sullivans. She is the same Hannah Callaghan who called Mrs. Sullivan Aunt Abby. At page 739 she testified that John was a stout, fair young man. Witness was ten or twelve years old when John left.

Margaret Cronin testified (739): Lives in Evergreen street; is over sixty years of age; was born in Evergreen street. Knew Peter Sullivan who lived in Evergreen street. His family in Evergreen street consisted of a daughter, Ellen, a daughter, Bessie, and John. Hannah Callaghan lived with them. The wife of Peter was named Abby. Her maiden name was Abby McAulliffe. Bessie was the oldest of the children, Ellen was next, John was the youngest. Bessie died in a madhouse. Ellen married a foreign sailor named Emmanuel Silva. John went to sea. Witness knew Hannah Callaghan since she was fourteen years of age. Hannah Callaghan always called Abina aunt. Knows that Hannah Callaghan was the daughter of a sister of Abby Sullivan. After the death of Ellen and Bessie, Hannah lived with the old man. Peter Sullivan worked at Beamish's Brewery. Used to see him passing her house. Hannah Callaghan, the complainant, is the same Hannah Callaghan the witness knew as a girl. Peter Sullivan was blind in one eye. Cross-examined by Mr.

Riddle, the witness testified that her house in Evergreen street was about fifty yards from Peter Sullivan's house.

Mary O'Leary testified (745): Resides at No. 2 Crone's Lane. Is a daughter of Ellen Davidson, a witness in the case. Is about 48 or 49. Knew Peter Sullivan in Evergreen street. He used to work at Beamish & Crawford's Brewery. His wife's name was Abby. The family consisted of Peter Sullivan, his wife, their children Ellen, Bessie and John, and Hannah Callaghan. Bessie worked in a situation with Mrs. Lyons. She lost her mind and went to Bull's Asylum. Ellen married a man named Silva, a sea-faring man. She had no family. She is dead. Never knew John. Heard John's mother tell a neighbor that there was a letter from John. Always remembered Hannah Callaghan living with the Sullivans. Hannah Callaghan called Mrs. Sullivan Aunt Abby. Knew that Hannah Callaghan and Ellen, Bessie and John were first cousins. Hannah Callaghan kept house for the old man until he died. Recollects the death of Mrs. Sullivan and of Peter. Ellen died before the parents. They were buried in Botanical Gardens. Hannah Callaghan, the complainant, is the same Hannah Callaghan who called Mrs. Sullivan Aunt Abby, and who kept house for Peter Sullivan.

Peter Sullivan and Abby McAuliffe were married the 22nd of September, 1832, Exhibit "A" (776). Their coffin plates were found together in the grave of their daughter Ellen Silva, who John Sullivan made oath was his sister, and on whose estate letters of administration were granted to him as next of kin, namely, her brother.

So far, then, as relationship is capable of demonstration, the evidence in this case demonstrates that John Sullivan of Seattle was the brother of Bessie Sullivan and Ellen Silva, and was the son of Peter Sullivan and Abigail Sullivan, whose maiden name was Abigail McAulliffe. Marie Carrau was convinced of these facts (267). Her counsel in Ireland was also convinced (115).

It remains, then, to show that complainants Hannah Callaghan and Edward Corcoran are the first cousins of John Sullivan.

We ask the Court to bear in mind that the counsel for the defendants fought vigorously the proposition that John Sullivan was the son of Peter and Abigail and the brother of Bessie Sullivan and Ellen Silva.

It is not surprising, therefore, to find them trying to contend against the overwhelming proof that Hannah Callaghan is the niece of Abigail Sullivan, being the daughter of her sister, Bridget Callaghan, and that Edward Corcoran is the nephew of Abigail Sullivan, being the son of her sister, Margaret Corcoran. The way in which they seek to overcome the case made by complainants is not by proof to the contrary, but by denying the identity of the man Edward Corcoran with the Edward Corcoran of Carrigaline, the nephew of Abigail, and by showing that the baptismal register states the name of Hannah Callaghan's grandparents as Denis McAulliffe and Margaret Murphy, and Corcoran's grandparents as Daniel McAulliffe and Margaret Murphy.

Hannah Callaghan, the complainant, is the daughter

of Bridget Callaghan, formerly Bridget McAulliffe, sister of Abina McAulliffe Sullivan, mother of John Sullivan. Corcoran, the complainant, testifies at page 592 that when about 17 years of age, he was living in Cork. He was introduced to Hannah Callaghan as his first cousin at John Sullivan's house, by his aunt. Corcoran stayed at the house of Humphrey Sullivan, who lived in Gillabbey Lane.

Mary Riordan, second cousin of John Sullivan, testies, at page 615: Knows Johanna Callaghan; knows that Hannah Callaghan was the niece of Peter and Abina Sullivan. She lived with them. She is one of the claimants of John Sullivan's estate. Always knew her to be a cousin of John Sullivan. Heard of Bridget McAuliffe. She was Hannah's mother. Heard that Bridget was a sister of witness' grandmother. Recollects her own grandfather, who was Humphrey Sullivan. Witness' mother's name was Margaret Sullivan. Peter Sullivan was employed at Beamish & Crawford's Brewery. He was a pensioner of the brewery. The family history she heard from her mother. Witness called Abina McAuliffe Aunt Abby. She was witness' aunt. Peter Sullivan was the nephew of Humphrey Sullivan. Peter and Humphrey married sisters. It was regarded as a peculiar thing that uncle and nephew should marry two sisters. Witness' mother was a first cousin of both Hannah Callaghan and Edward Corcoran.

Kate Riordan, second cousin of John Sullivan, testified (page 628): Knows Hannah Callaghan. She is a first cousin of my mother's—my second cousin. Heard from my mother that Hannah Callaghan was a first cousin to John Sullivan. Hannah Callaghan was partly brought up by

my mother's sister, John Sullivan's mother. Heard from my mother that my grandmother and John Sullivan's mother were sisters.

Margaret McGrath, formerly Riordan, testified at page 635: Is a daughter of John Riordan and Margaret Riordan, and a sister of Catherine and Mary Riordan, who have testified in this case. My mother's maiden name was Margaret Sullivan. She was the daughter of Humphrey Sullivan and Mary McAuliffe. Heard from my mother that Mary McAuliffe had three sisters; one was Abina, one Bridget and the other Peggy. Abina was married to Peter Sullivan. I knew Peter Sullivan. He worked at Beamish & Crawford's Brewery. When too old to work he was pensioned at nine shillings a week. I knew Ellen and Bessie. I did not know John. Ellen was my godmother. Ellen was married. Her husband's name was Emmanuel de Silva. He was a sailor. Bessie was a servant at Mrs. Lyons'. She died in Bull's Asylum. Hannah Callaghan lived at the house of Bessie and Ellen. She was a member of the family. Heard my mother say that Hannah Callaghan was her first cousin, and a first cousin of Bessie and Ellen. Heard my mother say that Abina Sullivan was Hannah Callaghan's aunt, and my grandmother was her aunt. I went to Peter Sulivan's house. I there saw Hannah Callaghan, my aunt, my uncle and Ellen Sullivan, who was working in a room off the kitchen. Bessie was at Mrs. Lyons'. I remember Peter, the father, who was a small, low-sized man, and blind of one eye. He took me slanging from school one day. He took me to the priest. Mrs. Sullivan was a low-sized, little woman.

Hannah Callaghan, the complainant, testified, at

page 663: My father's name was William Callaghan. Mother's name was Bridget McAuliffe. Was born seven miles outside the city, in the parish of Carrigaline. I was reared in the city of Cork; came to Cork when very young. Came to the house of my uncle, Peter Sullivan's wife, Abina McAuliffe, who married Peter Sullivan. That was after the death of my mother. Lived with them up to the death of my uncle and aunt. They had three children, Bessie, who died insane, the second was Ellen, and the youngest John. I supported myself partly by crochet work. There was a great demand for that thirty years ago. Lived with my uncle in Crone's Lane. Afterwards went to 10 Evergreen street. Ellen died in her father's house. She was married. Bessie died insane. Ellen was married to Emmanuel de Silva. His occupation was soliciting business. Remember Ellen's death. She never had any family. Bessie died insane in Bull's Asylum. She never married. She was in service at Mrs. Lyons', Clonville Quay, for forty years. I asked Mrs. Lyons, when writing to John Sullivan, to remember me to John Sullivan, my first cousin. John went away for twelve months and then returned. After the death of the father John's letters went to Mrs. Lyons'. Before John went to sea he worked at some jeweller's store in Cork, in Patrick street—Beston's is the name. Peter Sullivan was employed in Beamish & Crawford's Brewery. I carried his breakfast to him. He was pensioned at nine shillings a week. The last pension he received was on a Friday. He died the Wednesday following. I remember the names of my mother's sisters. Mary McAuliffe, Peggy McAuliffe, Bridget McAuliffe who was my mother, Abina or Abby. Peggy married a man named Corcoran, in Carrigaline. Knew that John used to write

to Mrs. Lyons. I asked Mrs. Lyons to remember Hannah O'Callaghan to John, and when he will hear the name O'Callaghan he will know I am here. It was after Bessie had gone to the asylum. Knew Humphrey Sullivan. He was my Aunt Mary's husband. I think Peter Sullivan and Humphrey Sullivan were nephew and uncle. Humphrey was the uncle. They married sisters. One was married to Mary and the other to Miles McCarthy. Mary was a sister of Abby. They had three children, Peter, Bessie and Margaret. Margaret was the daughter of Humphrey Sullivan. She married John Riordan. John Sullivan was about sixteen or eighteen when he went away for good.

Timothy Hurley (certified at page 668-669): He was a schoolmate of John Sullivan at the South Monastery. Knew that Hannah O'Callaghan was a member of the family of Peter and Miles Sullivan; knew John's cousin. Always heard of Hannah as a niece of the Sullivans.

Bessie Murphy (certified at 669): The testimony of this witness is quite important. Has been working for fifty years in Reynolds & Crawford's Brewery. Knew Peter Sullivan remarkably well. He lived in O'Connell's Lane. Knew the rest of his family, his son, two daughters, and his wife. His son's name was John. The daughters' names were [illegible]. The son went to Cincinnati or a similar city and settled down in business. Used to write letters for Peter Sullivan to his son John. Addressed some letters. Knew Hannah O'Callaghan for years. Knows that Hannah O'Callaghan was a niece of Peter Sullivan's wife. Heard Peter Sullivan say she was his niece. Bessie died in the asylum. Ellen Sullivan married a Portuguese captain. Peter Sul-

livan worked in the cask department at Beamish & Crawford's. He lost an eye. It was misshapen or lost. His nickname was Lord Nelson as long as I can remember. Know that Peter Sullivan was a pensioner of Beamish & Crawford. His pension was nine shillings a week. He got that pension up to the time of his death.

Cross-examined by Mr. DONEGAN (page 696): Heard Peter say that Hannah was his niece. She was known as his wife's niece. Knew the Sullivans intimately. Knew them before John went to America. Was living about fifty perches from them. Cross-examined by Mr. Riddle (page 697): Knew John. He was about fourteen years of age when I first saw him. He was about sixteen or seventeen when he first went away. Saw him only twice afterwards. Knows that Peter was pensioned because I wrote for him the letter to get the pension. I often heard Peter Sullivan speaking of Hannah Callaghan to my father and mother as his niece. They were very intimate. I wrote to John Sullivan in America. The address was Seattle. I do not recollect the particular address. That was over thirty years ago, if not more. (By Mr. Howe—page 698): I knew the maiden name of Peter Sullivan's wife. It was Abby McAulliffe. Cross-examined by Mr. Riddle: Peter found out the address of John because John wrote to his father. I saw the letter. I do not think Peter was able to write. I wrote for him once or twice.

Edward Corcoran, complainant in this suit, is Edward Corcoran of Carrigaline, the son of John Corcoran and Margaret McAulliffe, who was a sister of Abigail McAulliffe, afterwards Abigail Sullivan, mother of John Sullivan.

Corcoran testified at page 590 as follows: My mother's maiden name was Margaret McAulliffe. She was called Peggy. I lived in Carrigaline until I was about sixteen years of age. I was apprenticed to a harness maker, Dan Mahoney. I served with him three years, until I was sixteen. I then went to the Grand Parade in Cork, to a man named Casey. I lived in Cork until I was twenty years. I knew the Sullivans of Gillabbey Lane. I also knew the Sullivans of Crone's Lane and Evergreen street. The Evergreen street Sullivan worked in Beamish & Crawford's Brewery. The maiden name of the wife of the Evergreen street Sullivan was McAulliffe. My mother and she were sisters. I knew three McAulliffe sisters, my mother and my two aunts. I was introduced to Hannah Callaghan by my aunt as my first cousin. That aunt was the mother of John Sullivan. I have been living Dublin forty-two years. Never returned to Cork until twelve months ago. I think my aunt who lived in Gillabbey Lane was named Mary. She was married to Humphrey Sullivan. They had three children. The youngest was the same age as myself. His name was Denis. There were one boy and two girls. I knew John Sullivan personally. His father worked in Beamish & Crawford's Brewery. He had two sisters. John was about my own age. His sisters were older. I lived in Gillabbey Lane with my aunt.

Mary Mahoney testified (page 605): Have lived in Carrigaline since I was eight years old. When living in Carrigaline I knew Edward Corcoran. His father's name was John Corcoran. His mother's name was Margaret McAulliffe. She was called Peggy. Peggy McAulliffe was her maiden name. I recollect the house they lived in. The

landlord of the house was Power. Edward Corcoran was bound to the trade of harness-maker in Carrigaline. The name of the man to whom he was bound was Dan Mahony. He left Carrigaline and came to Cork. He occasionally visited Carrigaline. When I saw him last year, I had no difficulty in recognizing him. He was very old, but his features were the same. The Ned Corcoran who is here to-day is the same Ned Corcoran I knew as a boy in Carrigaline, the son of John and Peggy Corcoran.

Michael Power testified (page 608): I was born and reared in Carrigaline. I remember a playfellow named Edward Corcoran. He lived in the house of my father. His father's name was John Corcoran. His mother's name was Peggy. John Corcoran was a tenant of my father's, and a bad tenant he was. Ned and I used to play together. He was apprenticed to Dan Mahoney, a harness-maker. He ran away and did not finish his time with Mahoney. He went to Cork. He is older than I am. I saw him in Carrigaline once or twice after he went to Cork. I had no difficulty in recognizing him recently. He has aged. We talked together and he remembered Power. The Ned Corcoran who is here to-day is the same Ned Corcoran I knew in Carrigaline. I knew his two brothers and two sisters perfectly well. There were John Corcoran, Denis Corcoran, Maria Corcoran, and Margaret.

At page 610 Power was asked whether he saw Edward Corcoran last year. Certainly. I would know him anywhere. At page 611 he said, I would identify him among a thousand.

When Canon Carey was called as a witness for Marie

Carrau, he proved Exhibits "R," "S," "T," and "U" (793-794). These exhibits show the baptism of Mary, John, Denis and Margaret Corcoran, the children of John and Margaret Corcoran, and corroborate the witness Power.

Michael Cooney testified (610): Reside in Carrigaline. Went to Carrigaline when an infant. I was once a nailer, but that is a thing of the past. I am a shopkeer now. I recollect Ned Corcoran, who is here to-day, as the boy I used to play with in Carrigaline. He is older than I am. Common sense tells me from the day I began earning, what age I am. I am about sixty-two. I calculate from the time I went to nail-making. Corcoran and I were apprenticed about the same time. We were playfellows from boyhood until we were apprenticed. His father's name was Jacky Corcoran. His mother's name was Peggy. (Page 612.) The Corcorans were tenants of Mr. Power. Ned Corcoran was bound apprentice to Dan Mahoney, the harness-maker. I recollect Ned's leaving Carrigaline and going to Cork. I saw him about a year ago. I did not know he was in the world, but I recognized him. The Ned Corcoran who testified to-day is the same Ned Corcoran I used to know as a boy in Carrigaline (page 612). When I saw him I identified him. I told him how men change. I could not believe in the change from a boy. I felt as if myself was old, and I do not feel old. I felt very sorry, you know, that kind of feeling. I do not believe I am so old at all. (Page 613). I recollect the mother of Corcoran. Her name was Peggy Corcoran. Corcoran pointed out to me the very place where my step-father worked in Carrigaline. (Page 614).

Mary Riordan, forty years old, grand-daughter of Humphrey Sullivan and Mary McAuliffe, testified (page 615), as to Corcoran's relationship.

Kate Riordan, a sister of Mary Riordan, testified (page 628) as to Corcoran's relationship.

Margaret McGrath, a sister of Kate and Mary Riordan, testified at page 635.

Mary Jenkins testified (page 642): I reside on Grand Parade. Knew Humphrey Sullivan and his wife. They lived in Gillabbey Lane. Humphrey Sullivan's wife's name was Mary McAulliffe. She had a sister whose name was Peggy. She married John Corcoran of Carrigaline. I knew Mary Sullivan, that is, Mary McAuliffe, and Peggy McAuliffe, well. I remember another sister, Abina. She married a man named Sullivan. The family of Humphrey Sullivan and Mary Sullivan were Margaret, Denis or Michael, and John. She had two sons and one daughter. Peggy McAuliffe married John Corcoran. I met her at Mrs. Sullivan's house, Mary McAuliffe's house. I knew all of the children of Peggy Corcoran. I recollect Ned Corcoran. He came from Carrigaline to Cork. He came to my house in Brandy Lane. Ned Corcoran's father had a sister, Nancy Corcoran, that is Ned's aunt, and my father was married to her on his second marriage. (Page 643.) Ned is a harness-maker. He used to stop at his Aunt Mary's right across the lane. He also used to visit Abina. The Ned Corcoran who testified to-day is the same Ned Corcoran I knew, the son of Peggy McAuliffe.

William Cochrane, former sheriff of King County, testified at page 150 as follows: That he met Sullivan in the

early seventies. He (Cochrane) was running a logging camp at Lake Washington. He was dealing with Crawford & Harrington. He went there to get some tobacco for his logging camp. They introduced him to John Sullivan, who had a store nearly opposite Dexter Horton's bank. Sullivan asked Cochrane where he was from. Cochrane told him from County Cavin, about 40 miles from Dublin. Sullivan told Cochrane that he had a cousin in Dublin. Cochrane asked him how he spelled his name, and Sullivan spelled it Corcoran. Cochrane then told him it was a different family, that he spelled his name Cochrane.

Hannah Callaghan also testifies as to the Corcoran family at page 667.

As far as parol evidence is concerned, therefore, it is clear that Edward Corcoran and Hannah Callaghan are first cousins of John Sullivan. The record evidence in the case establishes the followings facts: That Abina Sullivan, the mother of John, was, prior to the marriage, Abina McAuliffe. She married Peter Sullivan and became Abina Sullivan. (Exhibit "A," p. 776.) The witnesses to her marriage were Michael Murphy and Norry McAuliffe, and the marriage took place Setpember 22, 1832. The father of Abina Sullivan, therefore, must have been named McAuliffe.

By Riordan Exhibit No. 1 (page 797), we find that Mary McAuliffe was married to Humphrey Sullivan August 23, 1828. There is no baptismal certificate of either Abina or Mary McAuliffe. By Carrau's Exhibit "C" (page 809), it appears that Margaret McAuliffe was baptized March 20, 1810, and that she was a child of Daniel Mc-

Auliffe and Margaret Murphy. By Carrau's Exhibit "A" (page 809), it appears that Bridget McAuliffe was baptized October 28, 1804, and that she was a child of Denis McAuliffe and Margaret Murphy, but Canon Carey, at pages 754-764, testifies that in his opinion Denis was written by mistake instead of Daniel. By Carrau's Exhibit "B" (page 809), it appears that on July 22, 1807, Honora McAuliffe was baptized, and that she was the child of Daniel McAuliffe and Margaret Murphy. The oral testimony shows that there were four McAuliffe sisters, Abina, Margaret, Bridget and Mary. Honora seems to have been lost sight of, but we find that Norry McAuliffe, which is evidently a diminutive of Honora, was a witness at the marriage of Peter Sullivan and Abby McAuliffe, and that the other witness to the marriage was Michael Murphy, who evidently was a relative of the mother of Abina McAuliffe, who prior to her marriage with Daniel McAuliffe was Margaret Murphy. From Peter Sullivan and Abby his wife were descended Elizabeth Sullivan (Exhibit "B," p. 778), Ellen Sullivan (Exhibit "C," p. 780), and John Sullivan (Exhibit "D," p. 781). Margaret McAuliffe married John Corcoran (Exhibit "G," p. 785), and from them were descended Ned Corcoran, complainant (Exhibit "I," p. 786), Mary Corcoran (Exhibit "R," p. 793), John Corcoran (Exhibit "S," p. 793), Denis Corcoran "Exhibit "T," p. 794), and Margaret Corcoran (Exhibit "U," p. 794). Bridget McAuliffe married William Callaghan (Exhibit "F," p. 785), and from them is descended Hannah Callaghan, the complainant (Exhibit "H," p. 786). Mary McAuliffe married Humphrey Sullivan (Riordan Exhibit No. 1), and from them was descended Margaret (Riordan Exhibit No. 2), who married John Riordan (Riordan Ex-

hibit No. 3), and from John Riordan and Margaret were descended Catherine (Riordan Exhibit No. 4), Mary (Riordan Exhibit No. 5), and Margaret (Riordan Exhibit No. 6, pp. 797-803), who are second cousins of Hannah Callaghan and Edward Corcoran. It will be noted by the Court that the sponsors of John Sullivan are Humphrey Sullivan and Bridget Callaghan. The oral evidence is clear that Bridget Callaghan was a sister of Abby Sullivan, formerly McAuliffe, and Exhibit "F," page 785, shows that Bridget Callaghan was, prior to her marrige with William Callaghan, Bridget McAuliffe. The sponsors of Ellen Sullivan were William Murphy and Mary Sullivan (Exhibit "C," p. 780), the Mary Sullivan evidently being the sister (of Abby Sullivan, formerly McAuliffe), who married Humphrey Sullivan. Ellen Sullivan married Emmanuel de Silva (Exhibit "E," p. 783), and the witnesses to that marriage are Peter Sullivan and John Sullivan. Documentary evidence, therefore, clearly connects Abigail or Abby Sullivan, formerly McAuliffe, with Mary McAuliffe, the wife of Humphrey Sullivan, with Margaret McAuliffe, the wife of John Corcoran, and with Bridget McAuliffe, the wife of William Callaghan, and with Honora McAuliffe, the daughter of Daniel McAuliffe and Margaret Murphy.

Exhibit "M" (page 788) is the affidavit of John Sullivan that Ellen Silva was his sister, and that he was her only heir. Exhibit "N" (page 789) is the affidavit of John Sullivan that Eliza Sullivan was his sister and that he was her only heir. Exhibits "O" (page 790) and "P" (page 791) are the grants of administration to John Sullivan on the two estates. Exhibit "Q" (page 792) is the

bond of John Sullivan on which Eugene F. Collins is the surety. In the probate proceedings it clearly appears that John Sullivan of Seattle is the John Sullivan who administered on the two estates. To show the Court how the examination of the witnesses was conducted in Ireland, we call the Court's attention to page 751. Mr. Donegan offered to read into the record a certificate which had been filed in the probate proceedings, accounting for the delay in taking out administration on the estate of Ellen Silva. Mr. Howe objected that that was not the proper way to introduce the document in evidence, and that it tended to incumber the record. Mr. Donegan, who had been disregarding all objections which had been made to his method of cross-examination, upon this objection being made, said: "Having regard to the objection that has been made by complainants' attorney, I shall not read the document." It is very evident that his object was to try to create an impression on the mind of the Court that there was something in the document which was prejudicial to the complainants. Counsel for complainants therefore immediately withdrew the objection, and the following instrument was read into the record:

"Cork District Registry.

In the Case of ELLEN SILVA, Deceased.

We hereby certify that the cause of the delay in taking out administration in this case arose from the administrator's thinking it scarcely worth while doing so, as the estates were so small and his residence being in Seattle, U. S. A.

Dated this 25th day of May, 1900.

WYNNE & WYNNE,
Solicitors, Cork."

This document also establishes the identity of John Sullivan of Seattle with the John Sullivan who administered on the estates of his deceased sisters.

We think, therefore, that the documentary evidence in this suit, taken in connection with the oral evidence of the witnesses, furnishes conclusive proof that John Sullivan was the son of Peter Sullivan and Abby his wife; that Hannah Callaghan is the daughter of Bridget Callaghan, the sister of Abby Sullivan; that Ned Corcoran is the son of Margaret Corcoran, a sister of Abby Sullivan; and that the two complainants are, therefore, first cousins of John Sullivan of Seattle.

The letters of John Sullivan written to Eugene F. Collins, to Thomas S. Lyons, to Mrs. Lyons and to Mr. Gregg, the solicitor, in Cork, show conclusively that John Sullivan of the Sullivan Building, in Seattle, Washington, was the man who administered on the estate of Bessie Sullivan and Ellen Silva. The marriage and baptismal certificates show that his father and mother were Peter and Abby Sullivan; that his father was the Peter Sullivan who worked in Beamish & Crawford's Brewery is established beyond the possibility of doubt by the testimony of Mr. Hilliard and of Denis Murphy, and the books (pages 691-692) of the brewery prove that Peter Sullivan was in receipt of a pension from the brewery; that that pension was paid by Mr. Hilliard (page 692); that the application for the pension was prepared by Denis Murphy, and Denis Murphy testifies that he wrote letters for Peter Sullivan to John and read letters from John to Peter, and that the John Sulli-

van to whom he wrote and from whom he read letters was John Sullivan of Seattle.

We submit that the evidence demonstrates beyond doubt the relationship of complainants to the deceased.

The following genealogical table gives the family history within a small space:

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VIII.

THE CIRCUIT COURT CORRECTLY REFUSED TO ISSUE A SECOND COMMISSION FOR THE TAKING OF TESTIMONY IN IRELAND.

Assuming that counsel for the defendant Carrau will make the same argument upon the facts which they made in the Court of Appeals, it is unnecessary to reply at length to the comments upon the testimony taken in Ireland in behalf of the complainants. It is sufficient to show to this Court that counsel for defendant have not carefully read that testimony. They take the position that the Riordan sisters are not to be believed because they testify to facts occurring before they were born. A reference to their testimony will show that they were testifying to declarations made by their mother, who had died since making the declarations, and the declarations were admissible under the general rule permitting matters of pedigree to be proved by the declaration of a relative who died since making the declaration. The main argument, however, of counsel for defendant is based on affidavits and a certified copy of a hospital book, which were not put in evidence but which were submitted to the Circuit Court for the purpose of having that Court order a second commission to take the testimony of the custodian of that book as well as the testimony of certain other witnesses. Those affidavits and the extract from the hospital book do not prove anything. They were submitted to the Circuit Court for the purpose of endeavoring to delay the trial of the cause, not for the purpose of overthrowing complainants' case. To show

how counsel for Marie Carrau grasp at straws, we call the attention of the Court to the fact that because one witness, Ellen Davidson, testified, at page 707, that Hannah Callaghan was brought by Abina Sullivan out of the Union after the death of her father and mother, they procured an extract from the workhouse books of the Cork Union, for the purpose of trying to induce the Judge of the Circuit Court to believe that the Bridget Callaghan, who was in the workhouse, was the mother of Hannah Callaghan, the complainant, and that Hannah Callaghan, the complainant, was the Hannah Callaghan who was in the workhouse in Cork. They then argue that those two persons cannot be the persons mentioned in the Carrigaline records. It is perfectly apparent that they are not the same persons. Complainants never claimed that either Hannah Callaghan or her mother was in the workhouse in Cork. The extract from the workhouse books shows that the Bridget Callaghan there mentioned died in the workhouse. If the Hannah Callaghan there mentioned was removed from the workhouse, it would be necessary for the date of her discharge to have been entered in the same column in which the date of Bridget Callaghan's death was entered. There is no entry there as to the disposition of Hannah Callaghan, or of the Timothy Callaghan, mentioned in the workhouse record. It is evident, therefore, either that the workhouse record does not state the facts correctly, or that the Hannah Callaghan who entered the workhouse at the same time with the Bridget Callaghan there mentioned, is not the Hannah Callaghan who is the complainant in this suit, for the reason that no one contends that the Hannah Callaghan who is the plaintiff in this suit is an inmate of a workhouse, nor is there a par-

ticle of proof that she has ever been the inmate of a workhouse. It is also apparent from the extract from the workhouse books that the Bridget Callaghan there mentioned was only thirty years of age. She could not, therefore, possibly have been born in 1804. Neither could the Hannah Callaghan there mentioned as six years of age be the complainant in this suit, who is sixty-five years of age, for the workhouse extract deals with the year 1848. The fact of the matter is, that counsel for Marie Carrau seized upon the remark of the witness Ellen Davidson, that the complainant, Hannah Callaghan, was brought out of the Union by Abina Sullivan, and upon that they built the theory that the Bridget and Hannah Callaghan mentioned in the workhouse record were respectively the mother of complainant and complainant. The proposition, however, is too absurd to be seriously considered. That Hannah Callaghan, complainant in the present suit, lived for many years in the Sullivan family, is established beyond controversy. The Court is asked to believe although Mrs. Sullivan did have a sister named Bridget Callaghan, who had a child named Hannah Callaghan, who on the death of her mother needed the care of her aunt, that Mrs. Sullivan took from the workhouse a child named Johanna Callaghan, the daughter of a Bridget Callaghan, and made her one of a poor struggling family, although the child was no relation to her. The endeavor of counsel for Marie Carrau to establish by such evidence that complainant is not Hannah Callaghan, the daughter of Bridget Callaghan, the sister of Abina Sullivan, is a confession that Bridget Callaghan was a sister of Abina Sullivan, and that her daughter Johanna was a niece of Abina Sullivan. The documentary evidence in the case, and the oral testimony

of the witnesses, is conclusive that Hannah Callaghan, who is the complainant in this suit, is the Hannah Callaghan who was the daughter of Bridget, the sister of Abina. Even if it were possible to entertain this far-fetched theory of counsel for Marie Carrau, it would amount to nothing against Edward Corcoran. The confession by this argument of counsel for Marie Carrau, that the four McAuliffes were sisters, and that Edward Corcoran is the son of one of those sisters, would entitle him to recover. But in this case we have Edward Corcoran admitting that Hannah Callaghan, the complainant in this case, is his first cousin, the daughter of his aunt, Bridget Callaghan.

Another document which was submitted to the Judge after he had the case under consideration, for the purpose of obtaining the issuance of a commission, is a copy of a search from a public office made by Eugene F. Collins, showing the census return of Crone's Lane for the years 1841 and 1851. It appears therefrom that in 1841, the Sullivan family were residents of Crone's Lane. Hannah Callaghan's name does not appear. No one contended that in 1841 Hannah Callaghan was a member of the Sullivan family. Hannah Callaghan testified that in 1848 she carried Peter Sullivan his breakfast when he was at work in the brewery. The census return for 1851 does not show Hannah Callaghan as a member of the Sullivan familiy. It may be that Hannah Callaghan, testifying in 1901, gave the wrong date when she said that in 1848 she carried Peter Sullivan his breakfast. The matter is entirely immaterial. People of this class in Ireland have very little idea of time. A difference of five, ten, fifteen, or even

twenty years, when testifying many years afterwards, does not make much impression upon them, and Hannah Callaghan might well have made the date when she became a member of the Sullivan family a few years different from what it actually was. As an instance of the want of appreciation of time by some people, we have only to refer to the affidavit of Eugene F. Collins, a solicitor in Dublin, which was also submitted to the Circuit Court by counsel for Marie Carrau, in which he states that he is twenty-one years of age, although it appears from the evidence in the case that for many years he had been pursuing the profession of a solicitor. If a man of the intelligence requisite for practicing the profession of the law is uncertain as to his age, it is not remarkable that a witness of the class of Hannah Callaghan may have made a mistake of a few years when she testified to events which occurred fifty years before.

Another affidavit is that of James J. Mooney. It can afford the Court no light. The testimony of Cunningham (page 483) shows that Sullivan, when in Ireland, was not looking for cousins. Sullivan had known Cunningham for thirty years, and was godfather to his son. The first person to whom Cunningham mentioned the conversation in which Sullivan said that he had cousins, but was not looking for them when in Ireland, was Mr. Hays, counsel for Marie Carrau. If Mooney's testimony had been taken, and he had testified to the facts stated in the affidavit, the testimony would be of no value. The affidavit of Cotter, the man who made the extract from the workhouse books, is not that he gave a certified copy of the books relating to all the Bridget Callaghans, and all the Johanna Cal-

laghans, who appeared in those books, but only that he had been applied to by Mr. Donegan, the solicitor for Marie Carrau, for an extract relating to a certain Bridget Callaghan at a certain time. It is apparent that Mr. Donegan was endeavoring to obtain from Mr. Cotter information merely for the purpose of casting suspicion upon complainant Hannah Callaghan in this action; not that he was putting the Court in possession of all that the books of the workhouse might show, so that the Court could see how many Bridget Callaghans there were in Cork with children named Hannah.

Another affidavit submitted to the Circuit Court was that of Eugene F. Collins. By reference to the affidavit, the Court will see that Collins states that, having been put in communication with John Sullivan by Mrs. Lyons, he wrote to Sullivan, and that Sullivan wrote to him, Collins, a letter, in which he stated that he, Sullivan, was the only relative alive of his deceased sister. Further in the affidavit Collins states that he prepared a power of attorney, which he sent to Sullivan, who signed it and swore to it, and that the power of attorney contained the following final statement: "I am the only relative of the said deceased living." Collins further states that the power of attorney was defectively executed; that it lay around his office for years; that it was stamped with a ten-shilling stamp; that he cannot remember whether he returned it to Sullivan or whether it was mislaid. Fortunately for complainants, the letters of Mr. Collins to Sullivan are in the record (108-110), and the original letters from Sullivan to Collins were introduced by complainants in their case in chief. The Court will see by reference to those

letters (529-530) that Sullivan never told Collins that he was the only relative of his sister, but that he was the only *heir* of his sister, and by reference to the affidavits filed by Sullivan in the Probate Court in Ireland (Exhibit "M," page 788); Exhibit "N," page 789), the Court will see that Sullivan made the statement that he was the only heir of his sister. The Court will also see that Collins never called to Sullivan's attention the fact that the power of attorney was defectively executed. On the contrary, he acknowledged its receipt as perfected. He did not write to Sullivan that he could not procure administration because of the defective execution of the power of attorney, but because Mr. Roach refused to become administrator, and this letter was not written until after Sullivan had written to Collins to know how the administration proceedings were progressing. Correspondence between them then ceased for a period of nearly two years, and then Collins wrote to Sullivan, enclosing a draft of a new power of attorney to be executed by Sullivan. In it he gave directions as to what it should include. But the Court will find no direction to Sullivan to state that he was the only relative of his deceased sister.

Again, in his affidavit Mr. Collins states: "Mrs. Lyons sent me a private letter, in which she states that she had a recollection of a respectable woman who lived in Sunday's Well (the opposite side of the city from Evergreen street), asking her to send a kind message to John Sullivan. I copied out this portion of the letter and handed it to Mr. Wright." The Court will observe the use of the word "respectable." There was an effort made to show that Hannah Callaghan was not a respectable woman,

because she was in the habit, as a great many of her class are, of indulging in the drinking of too much porter. But, by reference to page 81 of the record, the Court will find an affidavit setting forth a copy of the extract from the letter of Mrs. Lyons to Collins, which Collins furnished to Mr. Wright. The extract is certified to by Collins as being correct. The word "respectable" does not appear in that extract, but the statement does appear in that extract that the woman who called on Mrs. Lyons and asked her to send a message to John Sullivan was a cousin of the Sullivans. In order to induce the Circuit Court to issue a commission, Mr. Collins supressed the fact that the woman who spoke to Mrs. Lyons was a cousin of the Sullivans, and stated in his affidavit that Mrs. Lyons said she was called on by a respectable woman. When the Court reads the testimony in the case, and considers the action of Mr. Collins in endeavoring to keep out of the record the letters from Sullivan to him and to Mrs. Lyons, you will wonder what was in the letter of Mrs. Lyons to Collins which prevented Collins from letting counsel for complainant see the entire letter. It seems to us that the inference is irrestible that either the letter contained information which was exceedingly valuable to complainants, or that it stated that Mrs. Lyons and Collins should be heavily paid for furnishing the information which it contained. Further in his affidavit Collins endeavors to show that the letters written by Sullivan, which were put in evidence by counsel for the complainants in their case in chief, were wrongfully obtained from him. That charge was fully answered by the affidavits set forth at pages 68-82, filed in opposition to the application of Marie Carran for a second commission. But the Court will notice that Mr. Collins did not

make the statement which Mr. Hays read into the record in this case, that the letters had been stolen from him. It is evident that he did not care to make that statement under oath. He further states that the letters contained frequent reference to the fact that John Sullivan had no relatives, and contained evidence of a most material kind, which, in the interest of all parties, should be put in evidence. Counsel for complainants placed in evidence all of the letters from Sullivan to Collins and to Mrs. Lyons and to Mr. Lyons. A reading of those letters will satisfy the Court that Collins' statement is not true, that Sullivan ever stated that he had no relatives. The strange part of the whole proposition is that when counsel for complainants called upon the witness-stand Mr. Denny, who had for twenty years been a paying teller in the Bank of Dexter Horton & Co., and who was familiar with the signature of John Sullivan, and who testified that the letters submitted were written by Sullivan, Mr. Hays objected to their reception in evidence. It is plain that the reason of this objection was, that they did not wish these letters to go in evidence unless Collins could be put on the witness-stand to prove them. Further in his affidavit Mr. Collins proceeds to argue that if Hannah Callaghan had been a member of the Sullivan family in 1841 and 1851, her name would have appeared in the census returns, a copy of which he attaches to his affidavit. We do not think that the Court will assume that, because Hannah Callaghan's name did not appear in the census return as a member of the Sullivan family in the year 1851, that therefore ten or more witnesses have perjured themselves when they swore that she was a member of the Sullivan family as far back as they could remember. The fact, however, that

Mr. Collins undertakes to argue the matter in his affidavit sufficiently shows his relationship to this case, and when borne in mind that the name "Collins" was originally written in the authorization for the appearance of a solicitor in behalf of Marie Carrau, and that upon Mr. Hays being given notice that Mr. Collins was to be examined as a witness in behalf of complainant, the name "Collins" in the original authorization was erased, and the name "Donegan" inserted, it must be perfectly aparent to the mind of the Court that Mr. Collins has all along been acting in collusion with Mr. Donegan, and been endeavoring to do all that he could to defeat the complainants' case.

By reference to the authorization to appear, at pages 810-811, the Court will observe that it is dated at Seattle, the 25th day of October, 1901. It will also be observed the name Donegan is in the authorization as printed, and that he is described as a solicitor of the city of Dublin. It is in evidence, and Donegan's own letters show, that Donegan was a solicitor resident in Cork.

On the 28th day of October, 1901, a notice of the taking of depositions was served on counsel for Marie Carrau, and in that notice the name appears "Eugene Collins" (pages 52-53). During the progress of the taking of the depositions, counsel for complainant became suspicious of Mr. Collins, and believed that he was acting in collusion with Mr. Donegan, and though nominally he was appearing in behalf of a claimant who had filed a claim in the State Court, he was in truth and in fact acting in behalf of Marie Carrau, and that a trap had been laid so that when counsel for complainants placed Collins upon the witness-stand

to prove the letters which Sullivan had written to him and to Mr. and Mrs. Lyons, Collins would endeavor to inject into his testimony matter which was untrue, but which would have for its object the injury of the complainants' case. Counsel for complainants therefore demanded that each solicitor appearing should file with the Commissioner his authority to appear. Upon this being done, Mr. Donegan filed the authorization just mentioned. The authorization demonstrates that Collins was all the time in the employ of Marie Carrau as her solicitor. The taking of the testimony of the witnesses was to have been begun on the 15th day of November, 1901. The authorization to appear was dated Seattle, October 28th, 1901. It had only time, therefore, by the ordinary course of mail, to reach Mr. Collins. In order to remove any suspicion which counsel for complainants might have as to the attitude of Collins, the name "Collins" was erased, and the name "Donegan" inserted. We have caused the original authorization to appear to be sent to the clerk of this court, and by an inspection of it the Court will see that where the name "Donegan" now appears the name of "Collins" originally appeared. Further, it being an admitted fact that Collins was a solicitor of Dublin and Donegan a solicitor of Cork, the authorization shows upon its face that, as originally drawn, it was for a Dublin solicitor to appear. The testimony, however, of Marie Carrau (page 311), shows that long before the solicitors for complainants went to Ireland to take testimony under the commission, Mr. Hays and Collins had been in correspondence. We submit, therefore, that so far as any statement of alleged facts appears in the affidavit of Collins, it is a statement

which would be discredited by any court in which Mr. Collins undertook to give testimony. His letters written to Mr. Hays, printed in the record in this case, demonstrate that he is unworthy of belief. The ostensible solicitor for Marie Carran, Mr. Donegan, has placed himself upon record. After counsel for complainants left Ireland, Mr. Donegan forwarded, through the commissioner who took the testimony, a statement in regard to the closing of the commission, and he there charged that the commission had been closed without notice to him, and contrary to an understanding with the solicitor for complainants. He also charged that Mr. Wright, who was acting in behalf of complainants, undertook, in the progress of the taking of depositions, to prompt one of the witnesses. The statement of the United States Consul, who was commissioner to take the testimony, disposes of this claim. "Y47" (571). The statement that the commission was closed without notice to him, is refuted over the hand of Mr. Donegan himself. At page 819, the Court will see the letter of Mr. Donegan, dated Cork, November 28, 1901, in which he states that he will not call any witnesses, and asks counsel for the complainants to notify Mr. Riddle to that effect. At pages 819-820, the Court will see similiar letters from other counsel appearing in the case. At page 769, the Court will find Mr. Donegan objecting to the course pursued by counsel for complainants, because they had not examined E. F. Collins, James Mooney, and ——— McCarthy, yet we have the affidavit of Marie Carran, prepared by Mr. W. F. Hays, after the return of the commission, in which, in order to obtain a new commission to examine those witnesses, and Mrs. Lyons and Cotter, the statement is made that some of the witnesses and their testimony were dis-

covered by Mr. Donegan after the taking of the testimony in Ireland (pages 58-62). It is not surprising, therefore, to find Mr. Donegan writing to Mr. Hays, on the 29th day of March, 1902, and stating, at page 116:

"In the face of what Messrs. Howe and Wright know, it is ridiculous to suggest that his (Mooney's) evidence was not procurable in November. Money was the only bar, and you must not blame me. I gave you ample time, and did my best for you and Marie Carrau's interest. If you wish for further information on this score, apply to Mr. Riddle. The same remark applies to Cotter."

Neither is it surprising that on April 16, 1902, Mr. Collins wrote Mr. Hays (102) as follows:

"Mr. Donegan has written you fully as to the effect of the evidence of Mooney and Cotter and I do not think you should have any difficulty in getting a new commission, save only on the ground that this evidence which is now tendered could have been obtained at the last commission. Whoever was finding the funds at that time is, in my opinion, to blame for this, as, if Mr. Donegan had the funds which you have since sent him at the time the commission was heard in Cork, this evidence could have been put on the record, and made it a very difficult matter for the complainants to succeed."

In the same letter Mr. Collins advises Mr. Hays as follows:

"One thing you ought to make very material use of is the fact that none of the letters written by the deceased to Mrs. Lyons, are put in evidence, and that Mrs. Lyons, who was the only person John Sullivan seems to have spoken of while in Ireland, was not examined."

The trouble with this advice is, that the letters referred to by Mr. Collins had long before been put in evi-

dence by counsel for the complainants, and when offered in evidence Mr. Hays had objected to their being received.

At page 116, Mr. Donegan, under date of March 29, 1902, wrote Mr. Hays:

"I regret beyond measure that you have not sent Mr. Collins his fee. He would have been able to swear a strong affidavit himself, and procure one from Mrs. Lyons, which I am sure would have enabled you to procure the fresh commission."

It appears that Mr. Collins was paid his fee, but his affidavit speaks for itself. The testimony of Mrs. Lyons, which Messrs. Collins and Donegan pretended to think of such importance, was testimony which would have corroborated the case of complainants. She had written a letter to Mr. Blake, a solicitor of Cork. That letter is set forth at page 76 of the record. Not only this, but Mr. Collins had prepared a statement of what Mrs. Lyons would testify to, and had sent that statement to Mr. Wright, as appears by the letter of Mr. Collins, set forth at page 82 of the record. The statement which he prepared is set forth at page 81. By reading that statement, the Court will see that the testimony of Mrs. Lyons would not only have corroborated the case of complainants, but that it showed that the statements of Mr. Collins and of Mr. Donegan as to how the letters which had been written by Sullivan to Mr. Collins and to Mr. and Mrs. Lyons were obtained, was absolutely false. All of the witnesses whom Marie Carrau desired to examine under a second commission were persons whom her solicitor was well acquainted with. Canon Carey had been examined as a witness in her behalf.

Mooney was a clerk in the office of Wynne & Wynne, solicitors, in Cork, who had made a statement to Donegan during the progress of the taking of the depositions as to his information concerning John Sullivan. Cotter was the keeper of the public records in the city of Cork. The names of these persons, and their residences, had been furnished to counsel for Marie Carrau by counsel for the complainants.

It seems to us that it is only necessary to call the attention of the Court to the fact that, although counsel for complainants called thirty or more witnesses, who had lived all of their lives in Cork or its suburbs, one or two of whom had lived for fifty years or more in the house in which they were born, and within a few yards of the place where John Sullivan lived, to establish the relationship of complainants to Sullivan, not one of these witnesses were impeached by counsel for Marie Carrau, nor was any evidence to contradict their testimony brought forward. If complainants are not the persons whom they claim to be, why was not some witness brought forward to show who they are? In an old community, where people frequently live all their lives and die in the same houses in which they were born, it would be a very easy matter to expose a false claim of identity. In the whole city of Cork not one witness was, or could be, found to cast doubt upon the testimony of complainants and the witnesses in their behalf who had known them forty years ago; witnesses, some of whom had gone to school with John Sullivan and his sisters. The testimony in behalf of complainants stands uncontradicted; and why? Because it is true; because counsel in Ireland knew it to be

true and could find no one to dispute it. In the face of this evidence it is idle to ask this Court to hesitate. No other conclusion can be reached than that complainants are the first cousins, heirs at law and next of kin of John Sullivan, and as such entitled to his estate. Marie Carrau has sworn that she cannot rebut the evidence given by complainants except by the witnesses named in her application for a commission (page 62); she has sworn "that they are the only individuals who are acquainted with the facts," and "that she cannot prove these facts by any other person or persons than those mentioned in said application" (page 88). The affidavits of the witnesses named by her, except that of her solicitor, Mr. Donegan, are before the Court. The letter of Mr. Donegan is before the Court. Defendant has confessed that the relationship of complainants has been established because she has sworn that she cannot rebut the evidence given by complainants, save by the testimony of parties whose statements corroborate those of complainants and their witnesses.

IX.

THE PRETENDED WILL NEVER WAS MADE BY SULLIVAN. IT WAS THE RESULT OF A CONSPIRACY ENTERED INTO BY MARIE CARRAU, HER SISTERS AND BROTHER-IN-LAW DAUSSAT.

The alleged motive for the making of the pretended will is that Sullivan and Marie Carrau were engaged to be married (37).

THE FORMING OF THE ACQUAINTANCE BETWEEN SULLIVAN AND MARIE CARRAU.

Sullivan, in the summer of 1900, visited Europe and spent some time in Paris. His lack of knowledge of French embarrassed him. He returned to Seattle with the intention of again visiting Paris in September or October, 1900. In order to learn French he went to the house of Daussat in Seattle. Sixty days before his death he and Marie Carrau had never seen each other. It was on July 31, 1900, that they first met (264-279). He then saw for the first time Marie Carrau, her sister Hermance Carrau and Augustine Daussat (279). An agreement between Sullivan and the three women was made that, for tuition, an unfurnished room and two meals a day he should pay five dollars per day. August 4, 1900, he paid $35 in advance for one week's board, lodging and tuition. Exhibit "Y18" (528). He first occupied his room in the Daussat house on the 5th of August, 1900 (285).

THE PRETENDED ENGAGEMENT.

Sullivan was a bachelor, sixty years of age, worth several hundred thousand dollars. Daussat was a restaurant keeper, managing a restaurant in Seattle. His family consisted of his wife, Augustine Daussat, and his sisters-in-law, Marie Carrau and Hermance Carrau. The family rented rooms in their house to lodgers. Marie Carrau gave lessons in French. Marie Carrau testified that Sullivan told her that he went to the house of Daussat

to learn French by marrying a French lady (266, 313). She claims that on September 1, 1900, Sullivan asked her to marry him (287). She said that he told her:

"He had no one on earth, hardly any friends, what he could call, and he had no relatives of any kind, and he would leave everything to me, everything that he possessed would be mine, and he expressed himself very strongly." (287.)

The testimony of Marie Carrau as to the conversations with Sullivan was objected to by counsel for complainants, on the ground that it was inadmissible under the statute, being a transaction with the decedent.

It was important for Marie Carrau to provide an ear witness to the proposition of marriage. Hermance Carrau, her sister, therefore testified that on the 1st of September, 1900, she was in the dining room setting the table for dinner and Sullivan and Marie Carrau were in the parlor. All that she heard Sullivan say to Marie Carrau was:

"I have no relative, no one to leave it to, and all I possess will be yours." (441.)

By reference to Exhibit "Y18" (528), it will be seen that on this very day when Sullivan is alleged to have proposed marriage and which proposition Marie Carrau took under consideration for a week, Sullivan paid $35 in advance for a week's board, lodging and tuition, and was careful enough to write out a receipt and require Daussat to sign it. The proposition of marriage not having been accepted by Marie Carrau on September 1, 1900, and her

testimony being probably incompetent to prove its acceptance, it was necessary to provide an ear witness to the making of the engagement. Mrs. Eames lived next door to Marie Carrau. She was a close personal friend (260). She had a key to the front door of the Daussat house and made use of the telephone in the Daussatt house (241). The alleged acceptance of Sullivan's proposition of marriage Marie Carrau claims took place on September 8, 1900. Mrs. Eames went into the Daussat house to use the telephone. She took down the receiver but was unable to get Central. She hung up the 'phone and stood in the front door, and while there heard Sulivan say to Marie Carrau:

"As you know, I have no relatives and no friends, and I am possessed of a good deal of means, property, money, and if you consent to become my wife I will absolutely convey to you everything I possess in this world. I love you dearly and feel I cannot live without you." (243.)

She also heard Marie Carrau say that she had considered the matter and had decided to become his wife (243). Mrs. Eames then passed out of the house by way of the back door, and while doing so saw Marie Carrau and Sullivan sitting in the parlor on the lounge. This telephone was near the front door (247). Sullivan and Marie Carrau were in the parlor. The parlor had a door opening into the hall. The door was partly open. Mrs. Eames could see them (248). She took down the 'phone, Central said, "Line is busy." She hung up the 'phone, waited, and again took down the 'phone, and she remained there about ten minutes (249). According to her testimony while she could distinctly hear the alleged proposition of marriage made by Sullivan to Marie Carrau and the

acceptance by Marie Carrau, and while the door between the parlor and the hall where the telephone was, was partly open, and though they were sitting within a few feet of where the telephone was, and the telephone was a ten-party line, and she twice undertook to make use of the 'phone, neither Sullivan nor Marie Carrau were aware of her presence (249). Mrs. Eames never mentioned the matter to any one—not even her husband—until after the matter got into the newspapers, when she told her husband that she had heard the proposition of marriage, but she did not tell him the language of the proposition nor of the acceptance (252). It was not until two weeks prior to giving her testimony and nearly eighteen months after Sullivan's death that she, for the first time, told the language of the proposition of marriage and of the acceptance, and she then told it to one of the counsel for Marie Carrau (252). By reference again to Exhibit "Y18" (528) it will be found that Sullivan, on this 8th day of September, 1900, when Marie Carrau accepted him and he promised her everything, was a careful enough business man to write out a receipt for his weekly payment of $35 for board, lodging and tuition and to require it to be signed (156). It would naturally be supposed if the story of Marie Carrau were true that, she was to become Sullivan's wife, and was to become possessed of his hundreds of thousands of dollars, and the wedding had been set for October 1, 1900, the weekly payment of $35 in advance for board, lodging and tuition would have been dispensed with. It would, at least, be supposed that the charge for tuition by the woman so soon to become Sullivan's wife and the possesor of his fortune would not have been insisted upon. It would also be supposed that Sullivan would not have

thought it necessary to insist upon writing out his weekly receipt for board, lodging and tuition and requiring it to be signed. If, on the other hand, he was so careful a business man as to think it important that he should have a receipt for the services of his future wife and her family, and he was not being charged by her for tuition since the engagement, it would not be supposed that he would have allowed Daussat to charge for an unfurnished room and two meals a day, the sum of $5 per day. Yet, by referring to Exhibit "Y18" (528), it will be found that on September 15, 1900, he again paid his weekly amount and required his weekly receipt. Neither would it be supposed that if the relations which are sworn to have existed between Sullivan and Marie Carrau, by her and her sisters and brother-in-law, did exist, she would, on the 5th day of October, 1900, as a creditor of the deceased, have prayed for the appointment of an administrator of his estate and sought thereby to collect the small amount which Sullivan owed from September 22, 1900, until his death. Exhibit "Y25" (531, 279, 280).

It is to be remembered that this wealthy man, who, according to Mrs. Eames, declared to Marie Carrau that he could not live without her, and promised if she would become his wife she would have all he possessed, neither gave her an engagement ring nor one single gift (286). Although he was not taken ill until September 15, 1900, and the wedding was to take place, according to her story, on the 1st of October, 1900, she had made no preparations for it (291). Prior to Sullivan's death she had never told any one outside of the household of the intended marriage (317). Instead of the intimate friends of the part-

ies being called to testify to their knowledge of the engagement obtained in the usual way, it was necessary to prove the engagement by ear witnesses overhearing the proposition of marriage, and each of these witnesses testified that on these occasions Sullivan stated that he had no relatives.

Sullivan, who was in the habit of writing to Mrs. Lyons about his movements and plans (526), did write to her on September 12, 1900, four days after the day Marie Carrau claims she accepted his proposition of marriage and four days after the day when she says that she and Sullivan had agreed upon October 1, 1900, as the day when the marriage should take place.

In this letter there is no mention of an engagement, no mention of the date of an intended marriage. On the contrary, he says:

"*I* am going to leave for Paris the *last of this month. I* will spend the winter there. When the weather gets cold in Paris *I* will go down to Monte Carlo." (527.)

The correspondence between Sullivan and Mrs. Lyons which is in evidence makes it plain that if Sullivan was about to be married he most certainly would have stated that fact to Mrs. Lyons.

When these things are borne in mind, the conclusion cannot be escaped that between John Sullivan and Marie Carrau there was no engagement of marriage; there were no relations between them other than those of teacher and pupil, boarder and boarding house keeper.

THE WORDS CLAIMED TO CONSTITUTE THE PRETENTED WILL WERE NEVER SPOKEN BY JOHN SULLIVAN.

It is claimed by Marie Carrau that at eleven o'clock at night, September 25, 1900, Sullivan, who was sitting in his arm chair in his room, told her to call her sisters and brother-in-law. She did so. They went into Sullivan's room. Daussat said, "What is the matter?"

Sullivan said, "I want you to remember and witness that I will all my property and personal effects, worth many thousands of dollars, to be the money and property of your sister, Marie Carrau. I am sick, very sick, and I do not know what might happen."

Daussat said, "Thank you."

All except Marie Carrau left the room at once. Marie Carrau remained about five minutes. She could not speak. Sullivan did not speak any more. He seemed very much exhausted. Marie Carrau went down stairs to get him some milk, and when she returned Sullivan was in bed and asleep (270). This is the account given by Marie Carrau of the scene of the making of the alleged will. Sullivan did not die until the next morning.

After leaving Sullivan's room Marie Carrau, according to her story, went to a desk in the sitting room and with a pencil wrote down the words that she claims Sullivan said, and then returned to his room.

She was asked on cross examination the following questions:

"Q. Now, Mr. Sullivan after saying these words that you say he said, had plenty of time before he died to have signed that writing, did he not?

Mr. HAYES: I object as incompetent, irrelevant and immaterial, and asking for an opinion.

A. I do not think that he was able to, because he never spoke to me since.

Q. Never spoke to you afterwards?

A. No, he was drowsy or sleepy.

Q. He was drowsy and sleepy?

A. Yes sir.

Q. As soon as he said these words?

A. Well, I told him that I would go and—

Q. Did he go to sleep as soon as he said these words?

A. When I came back he had retired, he was asleep.

Q. Was he breathing hard?

A. Yes, he was breathing very hard." (296.)

Marie Carran was a Roman Catholic. Sullivan was a Roman Catholic. He held a pew in the Church of Our Lady of Good Help, of which Father Prefontaine was the priest. A telephone was in the house. No priest was called for. A doctor lived next door. Neither he nor any other physician was called for. The man, who, according to Marie Carran's story and that of her sisters and brother-in-law, had summoned the household around him at eleven o'clock at night, had told them,

"I am sick, very sick, and know not what might happen," was left for the remainder of the night without any one in his room.

In spite of the foregoing facts, the sworn answer filed by Marie Carran in the proceedings in the State Court, alleged:

"That at said date and up to within a very few moments of the death of said John Sullivan he had possessed

all of his reasoning faculties and was then and there of the age of sixty-three years and of sound and disposing mind and fully competent to make and publish such a will, and upon his own motion and without suggestions from any one and because he loved this answering respondent and because of the relationship existing between this respondent and said Sullivan, and because within a brief time they were to be married, the said Sullivan did then and there make said will, devising all of his property, both real and personal, to this respondent, and did then and there bid three persons who were persons other than respondent to bear witness that such was his will." Exhibit "Y34" (550).

The next morning Marie Carrau went into Sullivan's room, handed him the newspaper, and placed his eyeglasses on for him. She left the room to get his breakfast. When she returned he was dying or dead. (296, 298).

Mrs. Eames was called by Hermance Carrau and she went into Sullivan's room. This was after nine o'clock on the morning of September 26, 1900. Mrs. Eames testified that within a half hour after Sullivan's death, Marie Carrau being distressed, she, Mrs. Eames, endeavored to console her, and Marie Carrau replied:

"You cannot understand what it meant for me. It was everything to me. We were to be married *and he was to have left me everything. Everything was to be mine.*" (256).

On the day of Sullivan's death, the 26th of September, 1900, after Mrs. Eames had talked with Marie Carrau, and after Sullivan's body had been removed from the house by Mr. Littell and Dr. Carman, Marie Carrau claims to have made a copy of the alleged penciled will and to

have had it signed by Hermance Carrau, Augustine Daussat and Louis Daussat (304, 305).

The manner in which the record in this case was compiled would make it appear that Daussat testified prior to the date on which Marie Carrau and her sisters testified, but by reference to the Master's Report (519), it will be seen that these witnesses testified in the following order: Marie Carrau, Hermance Carrau, Augustine Daussat and Louis Daussat, and not in the order in which they appear in the depositions to have testified. It is important that this fact be borne in mind.

On her cross-examination, on being asked why she wrote down the words which she claimed Sullivan spoke, Marie Carrau said she did not know, she could not give any reason for her action, unless it was that she wanted to please him (301). Upon being asked whether she thought the words were of any special importance, she replied she did not know, and upon being cross-examined testified as follows:

"Q. What did you think these words were?

A. I thought it was the expression of a written will he had made, a written will.

Q. You thought he had made a written will?

A. Yes sir, because he had told me that they did not respect the law and he wanted to know what he meant.

Q. And you thought that Sullivan had made a will just like these words, was that it?

A. Yes sir.

Q. Was that the reason you had them put in writing, so that you could remember it?

A. No, that was not the reason at all.

Q. Now, did you understand that the words that Mr. Sullivan had said when your brother and sisters came in there, that he was trying to explain to you that he had made a written will with those words in it?

A. Yes sir." (301, 302).

On being cross-examined for her reason in copying the alleged penciled will and having her brother-in-law Daussat and her sisters sign it, she testified as folows:

"Q. What made you think of making this copy afterwards? What did you want to do with the copy?

A. I don't know. I could not tell what I wanted to do.

Q. Mr. Sullivan was dead at that time, was he not?

A. Yes sir.

Q. You did not want to show that to him, then?

A. No, but I wanted—what I wanted to do?

Q. What was your object?

A. *I had no object.*

Q. You had no object at all?

A. *No.*" (313, 314.)

Hermance Carrau, upon her cross-examination, testified, concerning her understanding of what Sullivan meant by the words he is alleged to have spoken when he had the Daussats and Carraus called into his room, as follows:

"Q. Now, did you understand that by these words Mr. Sullivan was telling you that he had made a written will?

A. Yes sir.

Q. *And he was explaining what was in this written will?*

A. *So we supposed.*

Q. *You did not understand that he was making a will?*

A. *We thought that it was written.*

Q. *You thought he was telling you what was in that written will, is that so?*

A. *Yes sir.*" (446).

Augustine Daussat, on cross-examination, testified, in reference to the alleged nuncupative will, as follows:

"Q. Did you understand that Mr. Sullivan when he spoke these words wanted you to understand that he had made a will, a written will, with these words in it?

A. Yes, of course, I guess so.

Q. That is what you understood?

A. Yes, I guess so.

Q. No (now) guess, but is that what you understood?

A. Yes.

Q. And he was telling you what his will contained?

A. Yes sir, we thought that the will was made.

Q. And you were surprised when the written will was not found?

A. Yes sir.

Q. *You did not understand at that time that he was making his will, did you?*

A. *No, we thought always that there was a written will.*

Q. *You thought that the will had been made before that?*

A. *Yes sir.*

Q. *And that he was telling you what was in that will?*

A. *Yes sir.* (471).

After Marie Carrau claims to have made a copy of the alleged penciled will and to have had the alleged ink copy signed by her sisters and Daussat, Father Sweere called at the house. She did not tell Father Sweere that she had written down Sullivan's words.

On cross-examination, Father Sweere said:

"She told me that when Mr. Sullivan got an attack that night of heart trouble that he called them all together and before them stated that Marie was his heir of all he possessed, both personal and real estate.

Q. These were the words that she told you?

A. These are about the words. I do not know exactly. I never expected to be a witness in this case.

Q. Just answer please, "yes" or "no," whether these were the words, as close as you can recollect?

A. I guess it is that way." (227).

Father Sweere further testified on cross-examination that the conversation with Marie Carrau took place the day after he read in the newspaper the account of John Sulivan's death; and being further questioned, he testified:

"Q. And at that time Miss Carrau told you that she thought Sulivan had made a will and that Mr. Littell had been up there and had got all the papers?

A. And cleaned the room out of everything there was. She did not know what he took.

Q. Now, did she say that the will of John Sullivan she thought was safe in Mr. Littell's hands?

A. I think so.

Q. Did she at that time that she mentioned the so-called verbal will tell you whether that will had been written out or not?

A. She did not say, no. She said she thought it was; she did not say it was.

Q. She did not tell you whether she had written it out or not?

A. No.

Q. So that the will that she meant was safe in Mr. Littell's hands was the previous will?

A. She did not tell me that, no. She simply told me she thought there was a will, a written will.

Q. That she thought there was a written will?

A. That is what she thought. She told me at the same time what he had done in the evening, as I testified before. (224, 225).

* * * * *

Q. Now, this will that she said she thought would be safe in Mr. Littell's hands, that was a written will, if he made a written will?

A. She did not say that there was a written will; she simply expressed her idea that she thought there was.

Q. She thought there was a written will?

A. She thought it would be safe in his hands if there was.

Q. She expressed the idea that she believed that there was a written will, did she not?

A. Yes sir, she felt there was, that was all. I don't remember now the words that were used.

Q. But that was the impression?

A. That was the impression conveyed to me, that she thought there was a written will.

Q. If there was a written will it was safe in Mr. Littell's hands?

A. Well, I suppose that is what she meant to say, but I do not remember." (229, 230).

It appears from this testimony beyond dispute that neither Marie Carrau, Hermance Carrau, nor Augustine Daussat understood that the words alleged by them to have been spoken at eleven o'clock at night on the 25th day of September, 1900, by Sullivan, constituted his will. They did not understand that they were witnessing a will, nor did they understand that Sullivan was making a will. Their own testimony, therefore, destroyed their claim that Sullivan had made a nuncupative will.

"The alleged nuncupative will must have disclosed a present consistent intention that the very words uttered should constitute one's will and that the witnesses should

understand the dying person in that sense and mark his words accordingly."

Schouler on Wills, p. 381.

"The testamentary capacity of the deceased and the *animus testandi* at the time of the alleged nuncupation must appear in the case of a nuncupative will by the clearest and most indisputable testimony."

1 Wms. Exrs. 121, 122.

"It is essential to the establishment of a nuncupative will that it shall, among other things, clearly appear (a) that at the time of uttering the words relied upon, the testator had a present, consistent intention that the very words uttered should constitute his will and that the witnesses so understood his language."

Syllabus 1 by the Court, in re Male's Will, 49 N. J. Eq., 266.

Hatcher v. Millard, 42 Tenn. 30.

Dorsey v. Sheppard, 12 Gill & J. 77.

The testimony of Marie Carrau, Hermance Carrau and Augustine Daussat was given on the 6th of March, 1902. No testimony was taken upon the 7th of March. On the 8th day of March, Daussat testified. It is evident that at that time Marie Carrau and her sisters understood that the testimony which they had given that they did not understand that the language which they claimed Sullivan had used constituted his will, but that they understood that Sullivan had theretofore made a written will and when he spoke the alleged words was telling them what that written will contained, was fatal to their case. Daussat was to do away with this testimony. When he went upon the witness-stand, counsel for Marie Carrau promptly

undertook to have him repair the breach which Marie Carrau and her sisters had made in her case, and he testified, on direct examination, as follows:

"Q. Now, at the time you were present and heard Mr. Sullivan state those words, what did you understand him to mean—what was your understanding at the time of what he meant?

A. Well, I understood that is the will of what he gives to my sister Marie. I understand that is the will.

Q. That that was a will of all his property to your sister Marie?

A. Yes sir, that is what I say." (350).

He also testified concerning the written copy which he signed, as follows:

"Q. Why did you sign that paper?

A. Because I am sure and believing that is the real will—that is the will he made for my sister—that is the will, the real will.

Q. That was the real will?

A. The real will.

Q. Did you at any time learn differently or learn that that was not the real will or a good will? If so, when?

A. Well, some days after.

Q. How many days?

A. Well, I learn, I think, it is four days after, three or four days, that is, on Saturday.

Q. On Saturday?

A. Yes.

Q. That that was not a good will?

A. No, that is no good will." (351).

On cross-examination, he testified:

"Q. When you put your name to this paper, did you think you were putting your name to the will of Sullivan?

A. Yes sir, I think that this was the real will, that he made it.

Q. You think that was the real will?

A. Yes sir.

Q. And when you put your name there to it, you thought you were putting your name to what was the real will of John Sullivan?

A. Yes sir.

Q. In order that that might be probated?

A. Yes sir." (371).

It will be remembered that this paper which Daussat swears he signed his name to as the will of John Sullivan is sworn by Daussat, Marie Carrau, Hermance Carrau and Augustine Daussat to have been written the day Sullivan died, after Mrs. Eames had been at the house and before Father Sweere arrived.

Daussat, however, has been impeached as unworthy of belief, and the witness impeaching him was Father Prefontaine, the pioneer priest of Seattle, the priest of the parish of Our Lady of Good Help, the priest of the church in which John Sullivan held a pew, and to which John Sullivan at times contributed assistance.

John Sullivan was buried on September 28, 1900 (274). Father Prefontaine conducted the funeral service. Returning from the cemetery, while on the train, Father Prefontaine sat alongside of the Daussats and near Marie Carrau.

On cross-examination impeaching questions were put to Daussat, and he was interrogated as follows:

"Q. Did you, coming back from the funeral, on the train, have any conversation with Father Prefontaine?

A. Well, we got some talks, yes.

Q. Did Father Prefontaine ask you whether you thought Mr. Sullivan had left a will?

A. No sir.

Q. You swear to that?

A. Yes sir." (391).

* * * * *

"Q. Did you not tell Father Prefontaine you thought there was a will?

A. We did not talk no will at all. We talked some about different places from Paris and so on, because that was no place to talk when a man was just buried in the ground.

Q. Did you not in that conversation coming back on the train from John Sullivan's funeral, say to Father Prefontaine that you thought there was a will and that John Sullivan had said Father Prefontaine would not be forgotten, or words to that effect?

A. You tell me that again, will you, Mr. Howe?

Q. Yes. Now, listen. Did you not say to Father Prefontaine on the train coming back from John Sullivan's funeral—

A. Yes.

Q. —that you thought that John Sullivan had left a will, because you had heard Mr. Sullivan say that Father Prefontaine would not be forgotten?

A. No sir.

Q. Did you not make substantially that statement to Father Prefontaine on that occasion?

A. No sir.

Q. Do you want to be understood as swearing that you had no conversation with Father Prefontaine on the subject of Sullivan's will?

A. Yes sir.

Q. And you are as positive of that fact—

A. Yes sir.

Q. —as of any fact you have testified to here to-day?

A. Yes sir." (392).

Father Prefontaine, a priest of the Roman Catholic Church, who has resided in Seattle since 1867, testified that he was the priest of the Church of Our Lady of Good Help. John Sullivan was one of his parishioners. He held the funeral services over John Sullivan. John Sullivan was buried in Calvary Cemetary. Father Prefontaine came back from the funeral on the train which brought Marie Carrau, her sisters and Daussat. He sat in their immediate vicinity and entered into conversation with Daussat in regard to Sullivan. He then testified as follows:

"Q. Did you and Mr. Daussat have any conversation in regard to Mr. Sullivan?

A. Yes sir.

Q. What was that?

A. Well, I asked Mr. Daussat if he thought that Mr. Sullivan had left a will, and he said, yes, I think he has. And he says, 'I think he must have left something for you, because he often said that he would not forget Father Prefontaine.'

Q. That was on the train coming back from John Sullivan's funeral?

A. Yes, that was on the train coming back from John Sullivan's funeral." (482).

On cross-examination by counsel for Marie Carrau, Father Prefontaine testified as follows:

"Q. Do you know, Father Prefontaine, whether or not Mr. Sullivan did remember you in his will?

A. I do not know anything about it.

Q. You have not been advised of any remembrance?

A. No.

Q. Were you expecting any recognition?

A. Well, I said to myself, if there is a will, Mr. Sullivan will certainly do something for the Church—not for me individually, but for the Church.

Q. For the Church. And when you learned that he did not do anything for the Church, you were disappointed naturally?

A. Well, when I heard that he had not left a will, of course I was not disappointed, because then I came to the conclusion that Mr. Sullivan had died suddenly and did not make a will." (482, 483).

It is clear, therefore, that the story that the alleged will of Sullivan had been reduced to writing and had been signed by Marie Carrau, her sisters and brother-in-law on the day Sullivan died was not true. The conversation between Father Prefontaine and Daussat took place two days after Sullivan's death. At that time, when asked by Father Prefontaine if he thought Sullivan had left a will, Daussat replied that he thought he had, and said,

"I think he must have left something for you, because he often said that he would not forget Father Prefontaine."

Yet, in his testimony Daussat claims that when he put his name to the paper which he claims was the written evidence of Sullivan's will he thought that paper was the real will of Sullivan and that he put his name there for that purpose and in order to have it probated, and that will left everything to Marie Carrau. If he had done as he testified, why did he tell Father Prefontaine that he thought Sulivan had left a will and left something for him?

Counsel for Marie Carrau, realizing that the testimony of Father Prefontaine would require the Judge of the District Court of the United States for the District of Washington, who had known Father Prefontaine for more than thirty years and who was himself a pioneer, to hold

Daussat unworthy of belief, recalled Daussat and endeavored to make a loophole by which he might escape.

On March 22d, Daussat was again placed upon the witness-stand by counsel for Marie Carrau, and he testified that he did talk with Father Prefontaine on the train returning from John Sullivan's funeral and that the conversation did relate to John Sullivan's will, and that Father Prefontaine asked him whether he believed Sullivan made any will, and Daussat replied "Yes"; that Father Prefontaine then said he was sorry he did not go to see Sullivan when he was sick, to which Daussat replied,

"Perhaps if you done so Mr. Sullivan would have remembered you and would have remembered you in the will."

Daussat further testified that at the time of his conversation with Father Prefontaine he had not been told that an oral will was not good, but that he at that time believed that an oral will was good (419).

Marie Carrau was recalled to change her testimony in regard to the will, and she testified that she thought at the time Sullivan was speaking the words which she claimed constituted his will that he was then making his will; that when she wrote the words down in ink she thought they were Sullivan's will; that when she got her sisters and brother-in-law to sign the instrument she did so because she thought it was Sullivan's will and she had them sign it for that purpose; and that she had that object in her mind at that time. (341, 342, 343).

She further testified that it was after Father Sweere told her that an oral will was not good that she came to the conclusion that Sullivan had made a written will (343). She had forgotten that Father Sweere had testified that he had not told her that an oral will was not good until three or four or possibly eight days after Sullivan's death (229); that she had testified that Father Sweere had not told her that an oral will was not good until Saturday, and her first interview with Father Sweere after Sullivan's death was on Thursday (273, 274); that Father Sweere had also testified that on the first occasion of his seeing Marie Carrau, which was the day after Sullivan's death, Marie Carrau had stated to him that Mr. Sullivan had called them sometime in the evening between ten and eleven o'clock and stated that he left all his real and personal estate to Marie, and then testified:

"Q. What did you do then?

A. I then asked her whether he had made a will to that effect and she said she thought yes. I says, 'Where is the will deposited?'

Q. What else did she say about his room?

A. She further said that Mr. Littell had been there early in the morning and had taken away everything out of the room and she thought it was taken into the hands of Mr. Littell." (219, 220).

It appears from the testimony that if Father Sweere was correct in the date when he said that he had the conversation with Marie Carrau, then at that time the alleged will had not been reduced to writing by Marie Carrau and signed by her brother-in-law and sisters, and that at that time she did not think she had in her possession the will of Sullivan, or she would not have said to Father Sweere,

in answer to his question, "Where is the will deposited?" that she thought there was one and that it was in the hands of Mr. Littell.

Hermance Carrau was recalled to change her testimony in reference to the will, and she swore that she believed at the time that Sullivan is alleged to have spoken the words that he was making his will; that she never thought there was a written will until Father Sweere had told them that an oral will was not good; that at the time she signed the copy of the alleged will on the morning of Sullivan's death she believed she was signing his will, she meant to witness it as his will; that since giving her testimony on the first occasion she had not talked the matter over with any one and that no one had suggested to her that she should make any change in her testimony. (460, 461, 462, 463).

Augustine Daussat was also recalled to change her testimony in regard to the will. She testified that when Sullivan spoke the words she thought they were his will; that they were the real will; that she did not understand anything about any other will; that the first time she thought Sullivan had left a written will was after Father Sweere said that an oral will was not good; that up to that time she thought that what Sullivan had said was a good will; that when she signed the written paper the day Sullivan died she thought she was signing his will; that that was the reason she signed it; and that Marie Carrau had put it in writing because it was his will; that she had not talked the matter over with any one, had never said to any one a word about it; that no one had

said anything to her about changing her testimony since she first gave it. (477-481).

Not a single important witness was called in behalf of Marie Carrau, who, after giving his or her testimony originally, was not recalled to change such testimony upon vital points.

Mrs. Eames, who had testified in her original testimony, that Marie Carrau had stated to her immediately after Sullivan's death that Sullivan *was* "to leave her everything," changed her testimony so as to make it read that Marie Carrau had said Sullivan was to "give" her everything (264).

Marie Carrau was recalled so as to make her testimony read that Sullivan had promised to "give" her everything, instead of "leave" her everything (334).

Mrs. Seckler, in her original testimony, had testified that Sullivan had gone to the Daussat house to make it temporarily his home. She was recalled for the purpose of changing her testimony so as to strike out the word "temporarily," and counsel for Marie Carrau endeavored to get her to say that Sullivan had used the word "permanently." (433). The object of this change is very evident. It was an effort to remove any doubt of the Daussat house being the residence of Sullivan, within the meaning of the statute relating to nuncupative wills.

It is unnecessary to point out further instances of the willingness of the Daussats and Carraus to testify to

anything which they believed would bolster up the claim of Marie Carrau.

One important matter, however, must be called to the attention of the Court, and that is that I. D. McCutcheon, Esq., a lawyer practicing in Seattle, had for four years been the attorney of Louis Daussat. On October 5, 1900, Marie Carrau and Louis Daussat went to Mr. McCutcheon's office, signed a petition for letters of administration upon the estate of John Sullivan, deceased, requested the appointment of I. D. McCutcheon as administrator, and in the petition stated that Sullivan had died intestate and that they were his creditors. Realizing that this written evidence conclusively established the falsity of the claim that they believed that Sullivan had left a will, Daussat and Marie Carrau took the position that before going to Mr. McCutcheon they had been advised that an oral will was not valid and they had no objection, therefore, to signing the petition for letters of administration; that they did not mention to Mr. McCutcheon anything concerning the alleged will because they had been advised that it was invalid. Mr. McCutcheon had been the advisor of Daussat for years. They testified as to the conversation which took place between themselves and Mr. McCutcheon. Having thrown down the bars Mr. McCutcheon was called as a witness for complainants and his testimony shows that Marie Carrau and Daussat signed the petition for letters of administration, fully understanding that they were alleging that Sullivan had died intestate, that they were his creditors, and that in the course of a few days Daussat returned to Mr. McCutcheon's office and demanded the return of the petition which Mr. McCutcheon informed him

could not be complied with because it had been filed. Daussat then informed Mr. McCutcheon that Mr. Hays had been employed by Marie Carrau (487-489). If the claim of Marie Carrau, her sisters and Daussat were true, that until they were advised by Father Sweere that an oral will was not valid, they believed that Sullivan had left a valid oral will, then they would not have signed the petition for letters of administration stating that Sullivan died intestate and they were his creditors. If, at the time of the signing of the petition for letters of administration, they had been advised that an oral will was invalid, then if they believed that Sullivan had left a written will they would not have signed the petition for letters of administration stating that Sullivan died intestate and they were his creditors. The fact of the matter is, that at the time the petition for letters of administration were signed the idea of an oral will had never been thought of. Father Sweere's memory was at fault. He never discussed it with Marie Carrau until after the petition had been signed. If the Court reads his testimony, it will be seen that his recollection is very uncertain upon important points. The fact that Mr. McCutcheon had been attorney for Daussat for years, and that Marie Carrau and Daussat both went to him on October 5th, 1900, and had him prepare the petition for letters of administration alleging that Sullivan died intestate and indebted to them, and that no mention of an oral will was made, is proof that at that time the idea of an oral will had never suggested itself to them. In a few days after signing the petition, however, Daussat demanded the return of the petition. It was then that the oral will was originated.

THE STORY OF THE MAKING OF THE ALLEGED NUNCUPATIVE WILL, AT 11 O'CLOCK AT NIGHT ON THE 25th OF SEPTEMBER, 1900, IS INHERENTLY INCREDIBLE.

History repeats itself. More than three hundred years ago, a young woman claimed an estate under an alleged nuncupative will said to have been made by an old man while *in extremis*, before nine witnesses. The perjury and subornation of perjury in the case gave birth to those sections of the Statute of Frauds of 29 Charles II., Chapter 3, which restrict the making of nuncupative wills.

Cole v. Mordaunt, 4 Veazy, 196, note.

Lord Chancellor Nottingham, who tried that case, bore a conspicious part in procuring the passage of the statute.

"But even these legislative precautions were insufficient to prevent the grossest frauds and perjury in the introduction of nuncupative wills."

Kent's Commentaries, 13th ed., Vol. 4, p. 517.

Schouler on Wills, Sec. 377.

The Territory of Washington, by the Act of 1854, threw around the heirs and next of kin of the deceased, John Sullivan, safeguards in addition to those established by the efforts of Lord Chancellor Nottingham, but even these have not been sufficient to enable them to avoid four years of bitter and expensive litigation to clear their title to their inheritance from the claim of an alleged beneficiary under a pretended nuncupative will, manufactured after the death of the deceased, probated by a decree based

on false testimony, rendered *ex parte*, and without jurisdiction.

The language of the Chancellor in the case of

Prince v. Hazelton, 20 Johnson's Reports, 501,

in holding void an alleged nuncupative will, is exceedingly pertinent to the case at bar. At page 509, he says:

"This will as certified by the four witnesses, is in these words: 'I now say, as I have repeatedly said before, that I leave all the property I am possessed of to Mary Hazelton. I do this in consequence of the good treatment and kind attentions I have received from her during my sickness. She is worthy of it. No other person shall inherit my property. I wish you all in the room to take notice of this.' This will carries marks of fraud on its very face. Let us examine it attentively. This sweeping donation is made, for what? For good treatment and kind attentions received from her during his sickness. The sickness had lasted only five weeks, and it was not so bad but that he was able occasionally to ride out. No person apprehended any immediate danger. He had a hired nurse, a colored woman, who was by him totally forgotten. What could this other woman have possibly done in the course of five weeks to awaken in any rational mind a sense of such enormous obligation, or to call forth such stupendous remuneration? I am forcibly struck with the folly and falsehood of the motive assigned. But the will goes on and adds 'She is worthy of it.' And where does her great merit appear, and from what circumstance does she entitle herself to this extravagant eulogy? The very declaration that she was worthy to possess all his estate proves that Jones must have been insane, or that the whole is a base fabrication. The will goes on further and says: 'No other person shall inherit my property.' And why these words of special exclusion of the rest of the world? They seem to imply a heartlessness and misanthropy very unnatural and very improbable for any man to express in the contemplation of death, and who is in the enjoy-

ment of the comforts and smiles of fortune, and especially for a native-born Irishman, who was in the midst of his emigrant countrymen and could not but have heard and felt the claims of religion and charity, of the widow and the orphan. He then adds: 'I wish you all to take notice of this'—a speech which looks so much like a contrivance that it does of itself throw a suspicion over the whole piece. This man must have been previously told that the statute required that, in making a nuncupative will, the testator must bid the persons present to bear witness that such was his will. It was made in the middle of the day, when he was quite comfortable and far from the apprehension of death, and in this respect, with all punctilious technical adherence to forms, it had the requisite number of witnesses and the address to the bystanders. Jones must have deliberately determined upon a nuncupative instead of a written will, and previously known and studied all the circumstances that were requisite to make it valid, or else this will has been since got up for him, like a puppet show, by the art and cunning of some juggler behind the scene."

Apply this language to the case at bar. Sullivan, possessed of property worth hundreds of thousands of dollars, disposes of it all. To whom? To the Church? No. He, who in his lifetime, contributed to his Church, upon his death-bed and while in "contemplation, expectation and fear of death," passed his Church by. Did he remember his old friend Mrs. Lyons, who had cared for his insane sister, and to whom he had written:

"I appreciate very much the kind favors that you have extended to her. I hope that I may never forget them." (Exhibit "Y6").

No; in the will the ties of friendship are forgotten, and all of his property is left to a woman whom he had not known sixty days, whose pretended engagement of marriage is evidenced neither by an engagement ring nor a

single gift, and for whose services in teaching him he paid in advance on the day it is claimed he proposed marriage, and required a receipt as evidence of his payment.

Not only this, but Sullivan, a Roman Catholic, surrounded by Roman Catholics, "in actual contemplation, expectation and fear of death," and who it is sought to prove was then already in the shadow of death, neither called for nor was provided with the spiritual aid of him who alone could remit the sins of a life of sixty years.

Yet the court is asked to believe that this man, under these circumstances, dictated a will conforming strictly to all the statutory requirements for its execution.

Will.

"I want you to remember and witness that I will all my property and personal effects, worth many thousands of dollars, to be the money and property of your sister, Marie Carrau. I am sick, and we know not what might happen."

Ballinger's Code, Sec. 4605.

"No nuncupatinve will shall be good when the estate bequeathed exceeds the value of two hundred dollars, (nor) unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling-house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return. * * *"

Is the language of the alleged will such language as would naturally been used? The alleged testator directs

the witnesses to remember and witness that he wills all his property and personal effects to be the money and property "of your sister, Marie Carrau." The man who had been sick and confined to his room since the 18th of September, concerning whom the physicians had had a consultation, thought it necessary to incorporate in this nuncupative will the statement:

"I am sick and we know not what might happen."

What possible reason could have moved him, at 11 o'clock at night, to suddenly arrive at the conclusion that he was sick? A physician lived next door, but he was not called in. The testator was a parishioner of the parish ministered to by Father Prefontaine. A telephone was in the house, but the priest was not summoned. Sullivan was sitting in his armchair, in his room. He left his armchair and went to bed. He had ample opportunity to make a will if he wished.

Marie Carrau claims that she reduced his language to writing a few minutes after Sullivan spoke. The law of the State allowed one of the witnesses to sign his name to the will for him, if he requested it. He made no such request. In the language of Prince v. Hazelton, *supra*, Sullivan—

"—must have deliberately determined upon a nuncupative instead of a written will, and previously known and studied all the circumstances that were requisite to make it valid, or else this will has been since got up for him, like a puppet show, by the art and cunning of some juggler behind the scene."

Nuncupative wills are everywhere regarded with suspicion. Knowledge of human nature teaches the wisdom of so regarding them. Legislators have written that knowledge of human nature upon the statute books. The courts have uniformly, by reason of their knowledge of human nature, required the strictest adherence to the forms of the statute and the clearest proof of the making of such wills.

Prince v. Hazelton, 20 Johnson 502.
Yarnall's Will, 4 Rawle 46.
Carroll v. Bonham, 42 N. J. Eq. 625.
Boyer v. Frick, 4 Watts & S. 357.
Haus v. Palmer, 21 Pa. St. 296.
Scaife v. Emmons, 84 Ga. 619.
1 *Redf. on Wills*, 185.
Schouler on Wills, Sec. 377.
Mitchell v. Vickers, 20 Tex. 377.
Brunson v. Burnett, 1 Chand. 136.

THE PRETENDED DECREE OF PROBATE WAS OBTAINED BY FRAUD, FOUNDED UPON FALSE TESTIMONY AND RENDERED WITHOUT JURISDICTION.

Sullivan died September 26, 1900. Mr. Littell was appointed special administrator of his estate. Numerous persons petitioned that letters of general administration should issue and a number of persons were nominated for the appointment. On the 19th of November, 1900, Terence O'Brien was appointed general administrator. He qualified and took charge of the estate. Marie Carrau and Daussat had petitioned for the appointment of I. D. McCutcheon. *At half past eleven o'clock a. m. March* 8, 1901,

the petition of Marie Carrau was presented to the Judge of the Superior Court of King County, State of Washington, setting up the alleged nuncupative will and praying its probate. The statute of the State of Washington, *supra*, prohibited the Superior Court from hearing any proof of a nuncupative will until a citation should be issued citing the widow or next of kin of the deceased that they might contest the will. On the presentation of the petition for the probate of the alleged will, the Judge of the Superior Court, *at half past eleven o'clock on the morning of March* 8, 1901, ordered a citation to issue directed to the widow and next of kin, requiring them to appear at *ten o'clock on the morning of the same day, a time then already passed,* to show cause why the nuncupative will should not be admitted to probate. One of the counsel for the petitioner for the probate of the alleged will took the citation, which was issued under the order, into the office of the Sheriff, and the Sheriff without leaving his office, returned that he was unable to find any widow or next of kin in King County. The testimony of the witnesses in support of the will had been previously typewritten. The certificate of probate and the decree of probate had been previously typewritten, and about half past eleven o'clock on the morning of March 8, 1901, the Judge of the Superior Court examined Marie Carrau, her sisters and Daussat, signed the certificate of probate and entered a decree probating the will. The entire proceedings were *ex parte*. The complainants in this suit were residents of Ireland. The statute gave them a right to be present at the probating of the alleged will to contest it. The citation issued at half past eleven o'clock a. m. of March 8, 1901, returnable at ten o'clock on the morning of the same day, did not afford them

either notice or an opportunity to be heard. The general administrator of the estate was in the City of Seattle in the discharge of the duties of his office. He had no knowledge of the proceedings to probate the will, nor was any notice given to him or to any one else. At that time there were on file in the office of the Clerk of the Superior Court of the State of Washington for King County, claims of certain persons, other than complainants, as heirs of John Sullivan, deceased. No notice was given to the attorneys for such persons, although the attorneys were residing in Seattle. The fact of the existence of such claims was not brought to the attention of the Judge. Those claims have not been prosecuted.

On March 26, 1901, Marie Carrau filed her petition for the revocation of O'Brien's letters of administration (557).

After March 26, 1901, and *prior to March* 30, 1901, one of Marie Carrau's counsel, who had assisted in the probate of the alleged will, became the attorney for the administrator (187).

On March 30, 1901, the petition for revocation of O'Brien's letters of administration was withdrawn without prejudice. Exhibit "Y41" (559).

On May 21, 1901, Marie Carrau filed her petition in the Superior Court for King County and prayed for the distribution of the entire estate to her as owner thereof under the nuncupative will, one of her attorneys being also attorney for the administrator. Exhibit "Y40" (555).

On the 20th of June, 1901, these petitioners filed their

bill in equity in the Circuit Court of the United States for the District of Washington (11,12), wherein they alleged substantially the facts hereinbefore set forth, and prayed that Marie Carrau be enjoined from asserting any title under the alleged nuncupative will, that it was probated without jurisdiction, that a nuncupative will was invalid where the estate bequeathed exceeded two hundred dollars, and that even if valid it could not convey real estate; that complainants were about to be deprived of their property without due process of law, in violation of their rights and of the Fourteenth Amendment to the Constitution of the United States.

The alleged decree of probate having been founded upon a citation issued at half past eleven o'clock on the morning of the 8th day of March, 1901, returnable at ten o'clock on the morning of the same day, the complainants being residents of Ireland and being required to appear in the State of Washington to contest the alleged nuncupative will, and the decree of the court being founded entirely on the testimony of Marie Carrau, her sisters and her brother-in-law, Daussat, and it having been found by the Circuit Court of the United States, for the District of Washington, that the testimony upon which the decree was founded was false and was given *ex parte*, the decree of probate was rendered not only without jurisdiction but was obtained by fraud, and a Circuit Court of the United States was therefore vested with full jurisdiction to enjoin Marie Carrau from availing herself of a judgment so obtained by which she was endeavoring to take the entire estate from the hands of the trustee and have it delivered to her.

The case at bar cries aloud for a firm adherence to the rules heretofore laid down by the courts. Not only is the preposterous story of the engagement of marriage put forward, with the testimony of ear witnesses to the proposition of marriage and the acceptance of that proposition; not only is the incredible story advanced of the making of the alleged will, of its subsequent reduction to writing, but the record shows that the funds of the estate, the property of the complainants, the trust fund held by the administrator, were used in the endeavor to prevent the complainants from obtaining a position where they could assert the invalidity of the alleged will and prove the fraud by which it was manufactured and probated.

The authorities are clear that the funds of the estate were illegally used for such purpose.

Wilbur v. Wilbur, 17 Wash. 683.
Roche Admr. v. Coffee, 73 Cal. 281.
Estate of Wright, 49 Cal. 550.
Bates v. Ryberg, 40 Cal. 450.
Estate of Merry, 65 Cal. 287.
In re Jessup's Estate, 80 Cal. 625.
Paget v. Brogan, 67 Ark. 522.

When the court reads the evidence of Marie Carrau, her sisters and her brother-in-law, we are satisfied that the conclusion will be reached which was reached by Father Prefontaine, the pioneer priest of Seattle, whose parishioner John Sullivan was, who, on being cross-examined by counsel for Marie Carrau and asked whether he was not disappointed that Sullivan had not left something for the Church, said:

"I was not disappointed, because then I came to the conclusion that Mr. Sullivan had died suddenly and did not make a will." (483).

THE SUPERIOR COURT OF THE STATE OF WASHINGTON NEVER ACQUIRED JURISDICTION TO PROBATE THE ALLEGED WILL, NOR TO HEAR ANY PROOF IN SUPPORT OF IT.

Ball v. Clothier, 34 Wash. 299.
Corcoran v. Bell, Judge, et al. supra.
Medlock v. Merritt, 102 Ga. 212.
Charlebois v. Bowden, 6 Mont. 373.
Perez v. Perez, 59 Tex. 322.
Randolph v. Bayne, 44 Cal. 366.
Hemingway v. Reynolds, 98 Wis. 501.

The estate of John Sullivan was under the control of Terence O'Brien, the general administrator appointed on the 19th day of November, 1900. The Superior Court of the State of Washington had jurisdiction of the administration proceedings under the decree appointing O'Brien administrator.

The Circuit Court of the United States for the District of Washington was the court which first acquired jurisdiction to determine the question whether the alleged will had ever been made; if made, whether it was not invalid by reason of being forbidden by statute, and if not invalid, whether it could convey real estate.

The jurisdiction of the Circuit Court to determine these questions having been invoked and exercised, and in

the exercise of that jurisdiction the Circuit Court having determined that the alleged nuncupative will never was made, that it never was probated, and that the time for probating it had expired prior to the filing of the bill, it was bound to protect its jurisdiction in the only way in which it could be protected, by enjoining Marie Carrau and all persons representing her, from setting up any claim of right or title to the estate of John Sullivan, deceased, under the alleged will and the alleged decree of probate.

Julian v. Central Trust Co., 193 U. S. 93-112.
French v. Hay, 22 Wall. 250.
Dietzsch v. Huidekoper, 103 U. S. 494.
Sharon v. Terry, 36 Fed. 337.
Pitt v. Rodgers, 104 Fed. 387 (C. C. A. 9th Circuit).
Rodgers v. Pitt, 96 Fed. 668.
Fiske v. Railway, Fed. Case 4830.
Larning v. Osborne, 79 Fed. 657.

It is, therefore, respectfully submitted that the decree of the Circuit Court of Appeals should be reversed, and that if the decree of the Circuit Court should be reviewed that decree should be affirmed.

Respectfully submitted,

SAMUEL H. PILES,
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Counsel for Complainants.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 193.

HANNAH O'CALLAGHAN AND EDWARD COROORAN,
APPELLANTS AND PETITIONERS,

vs.

TERENCE O'BRIEN, ADMINISTRATOR OF THE ESTATE OF JOHN SULLIVAN, DECEASED, AND MARIE CARRAU.

ON APPEAL FROM AND PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement Informing the Court that Certain Questions Involved in and Growing out of the Above-entitled Cause Have Been Certified to this Court for its Decision under the Provisions of Section 6 of the Act of March 3, 1891, Establishing Circuit Courts of Appeal.

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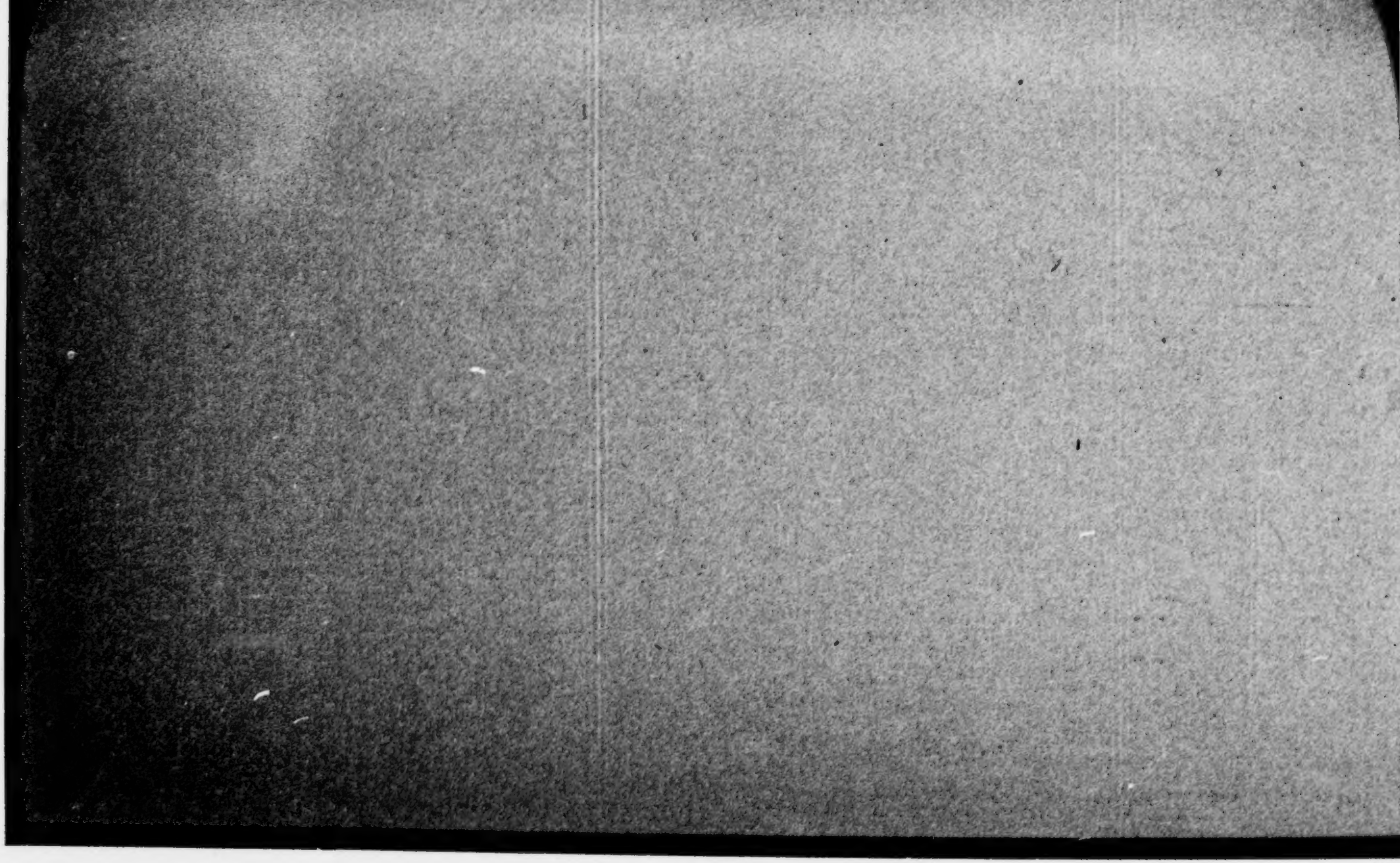

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ON APPEAL FROM AND PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement informing the court that certain questions involved in and growing out of the above entitled cause have been certified to this court for its decision under the provisions of section 6 of the act of March 3, 1891, establishing circuit courts of appeal.

STATEMENT.

Since the docketing of the appeal and petition for writ of certiorari in the above cause the circuit court of appeals for the ninth circuit has certified to this court for its decision the following question of law, viz:

"Was the order of the circuit court of the United States for the district of Washington entered on the 29th day of March, 1904, adjudging the petitioners, J. W. Robinson and Marie Carrau, guilty of contempt of court in accordance with right and under authority of law."

The decree of the circuit court for the district of Washington entered in July, 1902, enjoined Marie Carrau and all persons representing her from setting up the alleged nuncupative will and decree of probate mentioned in the bill of complaint in any court or elsewhere, except in a court having appellate jurisdiction to review that decree. When Marie Carrau appealed to the United States circuit court of appeals she filed the ordinary supersedeas bond, but did not obtain any order under rule 93, in equity, from the judge making the decree, modifying or suspending the injunction during the pendency of the appeal. The injunction was therefore left in full force and effect. The circuit court of appeals did not render any decision granting or refusing an injunction, but decided that the circuit court never had jurisdiction and entered a decree reversing the decree of the circuit court for want of jurisdiction, and directing that court to dismiss the bill. The complainants appealed to the Supreme Court of the United States from the decree of the circuit court of appeals, and obtained from the court of appeals an order superseding its decree upon giving a bond in the sum of five thousand dollars. The order of the presiding judge provided that, upon the bond being filed, the mandate and all other proceedings should be stayed until the final determination of the appeal by the Supreme Court of the United States.

That appeal was duly docketed and is now pending in the Supreme Court of the United States. In March last,

notwithstanding the injunction of the final decree of the circuit court, Marie Carrau and one of her solicitors, J. W. Robinson, Esq., filed proceedings in the superior court of the State of Washington for King county, in which were set up the alleged nuncupative will and the alleged decree of probate, and they invoked the action of the State court to make to Marie Carrau an allowance out of the estate of John Sullivan, deceased. Counsel for complainants thereupon applied to the circuit court for a rule against Marie Carrau and Mr. Robinson, requiring them to show cause why they should not be attached for contempt. They were duly served with this rule.

And the matter came on before Circuit Judge Hanford for hearing on the record of the proceedings in the State court. He found that Marie Carrau and her counsel were in contempt, and made an order directing them to file a præcipe dismissing their proceedings in the State court, and committed them to jail until they should file such a præcipe. Marie Carrau and Mr. Robinson then obtained from Circuit Judge Gilbert a writ of *habeas corpus*, returnable in San Francisco before the United States circuit court of appeals. On the hearing before that court counsel for complainants contended, first, that that court had no original jurisdiction, and that therefore the petition for the writ should be denied; second, that the circuit court had jurisdiction to punish for contempt a violation of the injunction granted by its final decree; that that injunction ever since it had been granted was in full force and effect; that the decree could not be collaterally attacked except for want of jurisdiction, and that the question of jurisdiction was before the Supreme Court of the

United States both on appeal and on application for a writ of certiorari.

The court of appeals took the matter under consideration and on the 3d of October, 1904, as above stated, certified to the Supreme Court of the United States for determination the question whether the order of Judge Hanford of March 29, 1904, was lawful and right.

This certificate has been lodged in the clerk's office of this court and the parties interested notified of the requirements to be complied with prior to its being docketed. It will doubtless be docketed at once.

It has been thought proper to submit the foregoing statement to the court at this time, in order that it might act both upon the motion to dismiss and the application for certiorari with full information.

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For Appellants and Petitioners.